CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 218

THE PEOPLE OF THE STATE OF NEW YORK, EX REL. C. HANDASYDE WHITNEY, APPELLANT,

vs.

MARK GRAVES, JOHN P. HENNESSEY AND JOHN J. MERRILL, TAX COMMISSIONERS OF THE STATE OF NEW YORK

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK

FILED JULY 22, 1936.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 218

THE PEOPLE OF THE STATE OF NEW YORK, EX REL. C. HANDASYDE WHITNEY, APPELLANT,

vs.

MARK GRAVES, JOHN P. HENNESSEY AND JOHN J. MERRILL, TAX COMMISSIONERS OF THE STATE OF NEW YORK

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK

INDEX.

	Page
Record on appeal to Court of Appeals of New York	"A"
Remittitur of Court of Appeals.....(omitted in printing)..	"A"
Statement under Rule 234	1
Notice of application for writ of certiorari	3
Petition for order and writ of certiorari	4
Undertaking for costs	15
Affidavit of service of undertaking	22
Notice of issue	23
Order granting writ of certiorari	24
Writ of certiorari	26
Return to writ of certiorari	30
Exhibit 1—New York State Income Tax Non-resident Return for 1929, filed by relator	32
2—Claim for credit	36
3—Claim for refund	37
4—Notice of additional assessment of income tax	39
5—Additional claim for refund	41

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 22, 1936.

—8321-C

Record on appeal to Court of Appeals of New York—Continued.
Exhibits—Continued. Page
6—Transcript of hearing before Assistant Director of the Income Tax Bureau 44
Exhibit "A"—Customer's agreement 69
Exhibit "B"—Order confirmation 73
Exhibit "C"—Sale confirmation 73
7—Affidavit of relator 74
8—Determination of State Tax Commission 76
Stipulation waiving certification in appellate division 78
Order of Appellate Division confirming determination 79
Decision of Appellate Division confirming determination 81
Order granting permission to appeal to Court of Appeals 83
Notice of appeal to Court of Appeals 84
Stipulation waiving certification to Court of Appeals 85

	Original	Print
Clerk's certificate ..... (omitted in printing) ..	85	
Remittitur of Court of Appeals	86	86
Order amending remittitur	89	88
Order on remittitur	90	89
Petition for appeal, assignments of error and prayer for reversal	92	90
Order allowing appeal	96	91
Bond on appeal ..... (omitted in printing) ..	98	
Citation and service ..... (omitted in printing) ..	100	
Stipulation as to transcript of record (omitted in printing)	101	
Statement of points to be relied upon and designation as to printing record	103	92

NEW YORK SUPREME COURT

APPELLATE DIVISION—THIRD DEPARTMENT.

PEOPLE OF THE STATE OF NEW YORK on Relation of C. HANDASYDE WHITNEY, Relator, vs. MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Tax Commissioners of the State of New York, Defendants.	On Certiorari to Review Determination of Tax Commission.

Statement Under Rule 234.

This is a certiorari proceeding brought under Section 375 of the Tax Law of the State of New York to review the action of the New York State Tax Commission in assessing an income tax and an additional income tax against the relator, a non-resident individual, based upon the Tax Commission's assessment dated March 8, 1933, for the relator's taxes against the relator's income alleged to have been received or earned in the State of New York during the year 1929.

The proceeding was commenced by service of petition and notice of application for writ of certiorari upon the State Tax Commission on February 27, 1935, returnable March 8, 1935,

4 *Statement Under Rule 234*

before Special Term Supreme Court, Albany County. An undertaking in form approved by a Justice of the Supreme Court was served upon the State Tax Commission on February 27, 1935, before the application was made. The order granting the writ and the writ were granted and issued on March 8, 1935, and was served upon the State Tax Commission March 13, 1935. A return to the writ was filed on March 28, 1935, and a copy thereof was served upon the relator's attorney on March 29, 1935.

5 The names of the present parties appear in full in the above title, and there has been no change of parties or attorneys herein.

Argument was had at the October, 1935, Term of the Appellate Division, Third Department, and a decision rendered on November 13, 1935, unanimously confirming the determination of defendants. Notice to Appeal from the order of said court entered November 18, 1935, was served on March 12, 1936, pursuant to permission granted by order of the Court of Appeals entered March 10, 1936.

6

Notice of Application for Writ, Served February 27, 1935, Filed March 8, 1935. 7

SUPREME COURT,

ALBANY COUNTY.

PEOPLE OF THE STATE OF NEW YORK on Relation of C. HANDASYDE WHITNEY, Relator, vs. MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Tax Commissioners of the State of New York, Defendants.	Notice of Application for Writ of Certiorari. 8

To the above named Defendants:

Please Take Notice that upon the annexed petition of C. Handasyde Whitney, verified on the 11th day of January, 1935, the undersigned will apply to the Supreme Court at a special term thereof appointed to be held in and for 9 the County of Albany, at the Court House in the City of Albany, on the 8th day of March, 1935, at the opening of Court on that day, or as soon thereafter as counsel may be heard, for a writ of certiorari to be issued out of said Court substantially in the form specified in said annexed petition and to such other and further relief as may be just.

CLARK, CARR & ELLIS,
Attorneys for Petitioner-Relator,
Office and P. O. Address,
120 Broadway,
Borough of Manhattan,
New York, N. Y.

Dated, February 26, 1935.

10 **Petition for Order and Writ of Certiorari, Served February 27, 1935, Filed March 8, 1935.**

SUPREME COURT,

ALBANY COUNTY.

PEOPLE OF THE STATE OF NEW YORK on Relation of C. HANDASYDE WHITNEY, Relator,	Petition for Writ of Certiorari.
11 vs.	
MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Tax Commissioners of the State of New York, Defendants.	

To the Supreme Court of the State of New York:

Petition of C. Handasyde Whitney, the above named relator, respectfully shows and alleges
12 to this Court:

1. The petitioner is, and at all times hereinafter mentioned was, a resident of and domiciled in the Commonwealth of Massachusetts and has never had any residence, domicile or place of business in the State of New York.

2. That in 1909 petitioner purchased a membership in the New York Stock Exchange; that the cost of said membership amounted to $77,000; that since 1909 this membership or seat has been owned by the petitioner and his partners, with varying interests, which in 1929 were as follows:

Petition for Order and Writ of Certiorari. Served February 27, 1935, Filed March 8, 1935

Petitioner C. Handasyde Whitney	25%
Geoffrey G. Whitney	25%
J. Chester Hutchinson	25%
William D. Elwell	25%

3. That all of the partners above referred to are, and at all times hereinafter mentioned were, residents of and domiciled in the Commonwealth of Massachusetts and at no time has any of them, either individually or as a firm, had any 14
residence, domicile or place of business in the State of New York, nor have they or any of them ever carried on, engaged in or transacted any business within the State of New York.

4. That the membership or seat stands in the petitioner's name on the records of the New York Stock Exchange, and so far as that organization is concerned the petitioner is the legal owner thereof.

5. That the New York Stock Exchange is a voluntary association which consisted of 1,100 15
members for some time prior to 1929; that about March 1, 1929, by proper resolutions of the association members the membership was increased 25 per cent to 1,375; that the holder of each such membership thereby became entitled in addition to his membership to a so-called "right" to one-fourth of a new membership; during the year 1929 the right attaching to the membership registered in the petitioner's name was sold for $108,000, and during said year said "right" to a membership was transferred to the purchaser and payment therefor received.

16 *Petition for Order and Writ of Certiorari, Served February 27, 1935, Filed March 8, 1935*

6. The membership on the said Stock Exchange vests in the member no title to property, and while held by a duly accredited member, merely results in certain benefits and permits the restricted exercise of certain rights and privileges by the member either in connection with his business wherever the same may be carried on or completely aside and apart from the business
17 of the member. One of such benefits accruing to the petitioner by virtue of said membership was the receipt of the said fractional "right" which when combined with three other such fractions would constitute a right to a new membership, subject to said Exchange's rules in reference to the transfer of memberships and admission of members. Neither the said Stock Exchange membership nor any of the rights and privileges thereof were ever used in connection with any business of the petitioner or any of his partners within the State of New York; the benefit from such membership con-
18 sisting of said fractional "right" to another membership was not acquired in connection with, as a part of, or as the result of, nor was it ever used in connection with any business transacted or carried on within the State of New York by said petitioner or any of his partners; and the said Stock Exchange membership and the said benefit derived therefrom, consisting of said fractional "right" to another membership, if property at all, each consisted solely of intangible personal property without any situs, business or otherwise, within the State of New York, and the sole situs thereof for taxing and

all other purposes was in the Commonwealth of Massachusetts which was the domicile of the petitioner and his said partners at all times mentioned herein. The taxable situs of said fractional right to another membership on the said Stock Exchange being in Massachusetts, the petitioner and all of his said partners took their respective profits on the sale of said fractional "right" into their tax returns to the Commonwealth of Massachusetts and each has paid all taxes levied by virtue of their said returns and no other state tax thereon is leviable or lawful.

7. Although membership in the New York Stock Exchange entitled the holder to be personally present and transact business on that exchange, the only business conducted by the petitioner or his firm consisted of a general securities and commission business buying and selling securities in the Boston market. The only use which the petitioner and his firm made of the privileges incident to membership in the New York Stock Exchange was to transmit orders for the account of their customers in the Boston market; which were transmitted by private wire to independent contractors who were other members of that Exchange transacting business in New York. These New York correspondents of the petitioner's firm executed in their own name and for their own account as principals such orders sent them by the petitioner's firm, the name of the petitioner's firm never appearing in the execution of such trans-

22 *Petition for Order and Writ of Certiorari, Served February 27, 1935, Filed March 8, 1935*

action on the exchange and the name of the petitioner's firm's customer never appearing on the New York firm's records. In handling such orders the petitioner's firm was the customer of the New York correspondent which carried the account of petitioner's firm in accordance with the standard form of customer's agreement, so that all of the business transacted by the
23 petitioner's firm was carried on in Boston, Massachusetts, and any part of their customers' orders which required execution in New York were executed in New York by the New York correspondents for the petitioner firm as a customer.

8. That the defendants above named are the duly appointed, qualified and acting Tax Commissioners of the State of New York, and as such constitute the Tax Commission of the State of New York, and that the defendants above named are hereinafter referred to as the "Com-
24 mission."

9. That for the calendar year 1929 the petitioner did not file any income tax return pursuant to Article 16 of the Tax Law of the State of New York on the ground that petitioner was a non-resident of the State of New York and had no income from business or property within the State of New York.

10. That no return of personal income having been filed by petitioner for the taxable year 1929, on March 8, 1933, an assessment of tax in the amount of $2,115, No. 562190, was duly stated by the Commission and notice thereof

mailed to the taxpayer; that thereafter on March 22, 1933, a return was filed with the Commission by petitioner under protest upon which the tax was computed by petitioner at $283; and that said return was duly audited and the amount of tax due under said assessment No. 562190 was adjusted at $181.82 and the balance thereof cancelled.

11. That on May 5, 1933, an additional tax of $98.18 was found by the Commission due upon the audit of said return; that due notice thereof was given to the taxpayer, under additional assessment No. 567511, on said date, making a total of said taxes and additional taxes for the said year 1929 of $280, which were paid by the petitioner under protest and taxes in a like amount and manner were assessed against and paid by the said partners of this petitioner.

12. That the said taxes and additional taxes levied for the year 1929 were based upon the difference between one-fifth of the original cost price of the seat to the petitioner, plus $600 which was one-fifth of the contributions paid in the form of dues, to capital of the New York Stock Exchange and the sale price of the seat "right"; that the total profits so calculated was divided in accordance with the New York Tax Law among the petitioner and his partners and in accordance with their respective interests as shown above.

13. That within one year from the date when said tax of $280 was audited and stated by the Commission and on or about the 5th day of

Petition for Order and Writ of Certiorari, Served February 27, 1935, Filed March 8, 1935

March, 1934, the petitioner, pursuant to the provisions of Section 374 of the Tax Law of the State of New York, made formal application to the Commission for a revision and readjustment of the tax liability of the petitioner for the calendar year 1929 and requesting hearing thereon.

14. That thereafter and on or about the 13th day of June, 1934, the petitioner entered into a stipulation with the Commission, waiving formal hearing before the Commission, and on said 13th day of June, 1934, the matter came on for hearing before Roy H. Palmer, Esq., First Assistant Director of the New York State Income Tax Bureau; that the taxpayer was represented thereat by Marcien Jenckes, Attorney, 30 State Street, Boston, Massachusetts; that a stipulation was entered that the record of such hearing should be of the same force and effect as if taken in a formal hearing before the State Tax Commission that thereafter the record came before the Commission for a review.

15. That thereafter and on or about the 17th day of December, 1934, petitioner received by mail from the Commission a notice dated December 10, 1934, setting forth the determination and decision of the Commission that the computation of the taxes and additional taxes of the petitioner for the year 1929 in accordance with the audit of said return was correct; that the said taxes so stated were properly assessed and due; that said taxes did not include any taxes or other charges which should not have

been lawfully demanded; that no payment had been illegally made or exacted thereupon; and that the taxpayer was not entitled to any further resettlement of the taxes so assessed.

16. Upon information and belief, that such determination and decision by the Commission of the aforesaid income tax, in the amount of $280, is not subject to any further review or appeal except to this Court for the writ herein sought.

17. That notice of application to this Court for a writ of certiorari to review said determination and decision of the Commission has been duly given to the Commission on the 27th day of February, 1935, and within ninety days after the service on the petitioner of the notice of such determination and decision.

18. That no previous or other application has been made to any court of justice or to any judge of justice for the writ or order sought in this petition.

19. Upon information and belief, that said alleged tax of $280 as recomputed as aforesaid is illegal and void under the laws of the State of New York and in violation of the Constitution of the United States.

Wherefore, the petitioner prays that a writ of certiorari proceed and issue out of this Court, directed to the said Mark Graves, John J. Merrill and John P. Hennessey, as Tax Commissioners of the State of New York, commanding them to certify and return to this Court:

Petition for Order and Writ of Certiorari, Served February 27, 1935, Filed March 8, 1935

All and singular, the proceedings, decisions and actions of the Commission had and made in the premises, the records of the proceedings had before them at said hearing in this matter, including all papers or affidavits submitted to them and a transcript of the testimony taken in connection therewith before Roy A. Palmer, Esq., First Assistant Director of the New York
35 State Income Tax Bureau, on June 13, 1934; and to the end that the petitioner may have such other and further relief as to this honorable Court may appear just.

C. HANDASYDE WHITNEY,
Petitioner-Relator.

Clark, Carr & Ellis,
Attorneys for Petitioner-Relator,
Office and P. O. Address,
120 Broadway,
Borough of Manhattan,
New York, N. Y.

36

Choate, Hall and Stewart,
30 State Street,
Boston, Massachusetts.

Marcien Jenckes,
30 State Street,
Boston, Massachusetts.

Of Counsel.

Commonwealth of Massachusetts,
County of Suffolk, ss:

C. Handasyde Whitney, being duly sworn, deposes and says:

Petition for Order and Writ of Certiorari, Served February 27, 1935, Filed March 8, 1935

That he is the petitioner-relator named in the foregoing petition and that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true.

C. HANDASYDE WHITNEY.

Subscribed and sworn to before me this
11th day of January, 1935.
Ethleen Heuser,
My commission expires March 21, 1941.

(Seal)

Service admitted by State Tax Commission, February 27, 1935.

Commonwealth of Massachusetts,
Clerk's Office of Superior Court.

Suffolk, ss:

I, Francis A. Campbell, of Boston, in said County, duly elected, qualified and sworn as Clerk of the Superior Court, for and within said County and Commonwealth, dwelling in Boston in said County, said Court being a Court of record with a seal which is hereto affixed, the records and seal of which Court I have the custody, do herein and hereby in the performance of my duty as said Clerk, certify and attest that Ethleen Heuser before whom the annexed affidavit, proof or acknowledgment was taken and subscribed, is a Notary Public for, within,

Petition for Order and Writ of Certiorari, Served February 27, 1935, Filed March 8, 1935

and including the whole of said Commonwealth, doing business in said County, duly appointed, commissioned, qualified, sworn and authorized by the laws of said Commonwealth to act as such; and also duly authorized by the laws of said Commonwealth to take affidavits and take and certify proofs of acknowledgment of deeds or conveyances for lands, tenements, hereditaments, lying and being in said Commonwealth; in any part thereof and to be recorded therein, wherever situated and however bounded; that she was at the time of taking the affidavit, proof or acknowledgment, hereto annexed, such Notary Public that due faith and credit are and ought to be given to her official acts; that I am well acquainted with her signature and handwriting, and I verily believe that the signature to the said affidavit, proof or acknowledgment is genuine, and, further, that the annexed instrument is executed and acknowledged according to the laws of said Commonwealth.

Witness my hand and the seal of said Court at Boston, in said County and Commonwealth, this 11th day of January, A. D. 1935.

FRANCIS A. CAMPBELL,
Clerk.
By JOHN L. MACCUBBIN,
Asst. Clerk.

(Seal)

Undertaking for Costs Filed February 27, 1935.

SUPREME COURT,

ALBANY COUNTY.

PEOPLE OF THE STATE OF NEW YORK on Relation of C. HANDASYDE WHITNEY,
Relator,
against
MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Tax Commissioners of the State of New York,
Defendants.

WHEREAS, the above named C. Handasyde Whitney, heretofore applied to the Tax Commission of the State of New York to revise, readjust and resettle the account theretofore audited and stated by said Tax Commission against said C. Handasyde Whitney for an income tax aggregating Two Hundred Eighty and 00/100 ($280.00) Dollars, based on income received by said C. Handasyde Whitney during the calendar year ending on the 31st day of December, 1929, as provided by Section 374 of the Tax Law of the State of New York; and a hearing having been had upon said application and the said Tax Commission having thereafter made its determination dated the 10th day of December, 1934, denying the said application for revision, readjustment and resettlement of the said account; and

46 *Undertaking for Costs, Filed February 27, 1935*

WHEREAS, said C. Handasyde Whitney is dissatisfied and aggrieved by said determination and intends to review said determination by writ of certiorari and desires to file an undertaking with said Tax Commission as required by Section 375 of said Tax Law of the State of New York;

NOW, THEREFORE, the Fidelity and Casualty Company of New York, a corporation organized and existing under and by virtue of the
47 laws of the State of New York, and duly authorized by the State of New York to execute surety bonds, having an office and principal place of business at #30 Maiden Lane, in the Borough of Manhattan, City, County and State of New York, does hereby undertake that if the said writ of certiorari, which may be granted upon the application of said C. Handasyde Whitney to review the said determination of the said Tax Commission be affirmed, said C. Handasyde Whitney will pay all costs and charges which may accrue against him in the prosecution of
48 said writ, including the costs of all appeals, not exceeding the sum of Five Hundred and 00/100 ($500.00) Dollars.

Dated, New York, February 26th, 1935.

THE FIDELITY AND CASUALTY
COMPANY OF NEW YORK,
By HAROLD PENNINGTON,
Attorney.

Undertaking for Costs, Filed February 27, 1935

FINANCIAL STATEMENT

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK

December 31st, 1934.

Assets

Bonds and Stocks	$26,854,088.00
Real Estate.	219,239.83
Premiums in course of collection (not 90 days overdue)	4,169,301.32
Interest accrued	181,770.70
Cash on deposit and in office	2,320,783.85
All other assets	552,865.91
Total Assets	$34,298,049.61

Liabilities

Unearned premiums		$10,511,049.25
Reserve for claims		15,612,867.88
Reserve for taxes and expenses		1,424,431.37
Reserve for all other liabilities		850,000.00
Net Surplus	$3,649,701.11	
Capital Stock	2,250,000.00	
Surplus to Policy Holders		5,899,701.11
		$34,298,049.61

At the regular meeting of the board of directors of The Fidelity and Casualty Company of New York, held at its office in the City of New York on the 21st day of November, 1934, a quorum being present, the following resolution was unanimously adopted:

52 *Undertaking for Costs, Filed February 27, 1935*

RESOLVED, That each of the following persons, to wit: Ernest Sturm, chairman of the board; Bernard M. Culver, president of the company; Frank A. Christensen, Charles L. Newmiller and Hale Anderson, each a vice-president of the company; William L. Bates, a secretary of the company; William P. Harvey, an assistant secretary of the company; Louis F. Ballerene, Arthur C. Borgeson, John C. Brodsky, Louis B. Caziarc, Arthur T. Clayton, George E. Friend,
53 Daniel J. Gallagher, Cornelius P. Godley, Thomas F. Graham, James R. Hillas, George C. Kaiser, William L. Macalister, Chauncey B. Manee, Joseph B. Mettalia, Delphine L. Michaud, Harold Pennington, John A. Rogers, Frank B. Smedes, Robert Steinemann, George E. Summerhayes, Charles Swanson, Harry V. Upington, Joseph G. Veit, Sara B. Voorhees and Arline M. Witbeck, each as an attorney, is hereby authorized to execute on behalf of The Fidelity and Casualty Company of New York bonds, undertakings, and contracts of suretyship; including agreements of co-suretyship and rein-
54 surance; and to attest the corporate seal of the company to any and all bonds, undertakings and contracts of suretyship signed by any of the said persons; provided—

1. That the authority herein granted to Louis B. Caziarc, Arthur T. Clayton, George E. Friend, Cornelius P. Godley, Thomas F. Graham, James R. Hillas, George C. Kaiser, William L. Macalister, Frank B. Smedes, Robert Steinemann, George E. Summerhayes, Charles Swanson, Joseph G. Veit and Arline M. Witbeck, shall be limited to bonds, undertakings and contracts of

suretyship of not more than one hundred thousand dollars unless the said bonds, undertakings or contracts of suretyship shall also be signed by the chairman of the board, the president, one of the vice-presidents, the secretary, or the assistant secretary named above.

2. That the authority herein granted to Louis F. Ballerene, Arthur C. Borgeson, Daniel J. Gallagher, Joseph B. Mettalia, Chauncey B. Manee, Delphine L. Michaud, Harold Pennington, John A. Rogers and Sara B. Voorhees, shall be limited to bonds, undertakings, or contracts of suretyship of not more than twenty-five thousand dollars unless the said bonds, undertakings or contracts of suretyship shall also be signed by the chairman of the board, the president, one of the vice-presidents, the secretary, or the assistant secretary named above.

3. That the authority herein granted shall become effective January 1, 1935, and shall expire December 31, 1935.

RESOLVED, further, that the appointment of each of the persons named herein to his or her respective office or position is hereby confirmed, and that the said appointees be, and each of them hereby is, authorized and empowered to certify, under seal, a copy of the foregoing resolution.

State of New York,
County of New York, ss:
City of New York,

Harold Pennington, to me known, being by me duly sworn, deposes and says that the affiant

58 *Undertaking for Costs, Filed February 27, 1935*

resides in Brooklyn, New York; that the affiant is an attorney of The Fidelity and Casualty Company of New York, the corporation which is described in and which executed the annexed instrument; that the affiant knows the corporate seal of said corporation; that the seal affixed to the annexed instrument is the corporate seal of The Fidelity and Casualty Company of New York, and was thereto affixed by order and authority of the board of directors of the said
59 company; and that the affiant signed the affiant's name thereto by like order and authority as an attorney of the company. The affiant further deposes and says that the foregoing financial statement of The Fidelity and Casualty Company of New York, to the best of the affiant's knowledge and belief is a full, true, and correct statement of the financial condition of the said company on the 31st day of December, 1934, and that the liabilities of said company do not exceed its assets as ascertained in the manner provided by law; and that the said company has received from the Superintendent of Insurance
60 of the State of New York a certificate of solvency and of its sufficiency as surety, or guarantor, pursuant to the Insurance Law of the State of New York and the Acts Amendatory thereof and supplemental thereto, and that such certificate has not been revoked. The affiant deposes and says that the affiant has compared the foregoing resolution of the board of directors of the said company with the original thereof, as recorded in the minute book of the said company, and does hereby certify that the same is a true and correct transcript therefrom, and of the whole of the said resolution, and the same

Undertaking for Costs, Filed February 27, 1935

is now in full force, and that the seal affixed thereto is the corporate seal of the said company.

HAROLD PENNINGTON,
Attorney.

Subscribed and sworn to before me this
26th day of February, 1935.
George C. Kaiser,
Notary Public,
Bronx Co. No. 10, Register's No. 22K36.
Certificates filed in
New York Co. No. 240, Register's No. 6K121.
Kings Co. No. 149, Register's No. 6194.
Queens Co. No. 339, Register's No. 2053.
Richmond Co., Westchester Co. and Register.
Commission expires March 30, 1936.

Undertaking approved February 27, 1935, by Hon. Gilbert V. Schenck, Justice of New York Supreme Court.

BOND OF

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK

80 Maiden Lane New York City

I approve the bond attached and the sufficiency of the Surety.

GILBERT V. SCHENCK,
J. S. C.

Dated: February 27, 1935.

64 **Affidavit of Service of Undertaking.**

SUPREME COURT,

ALBANY COUNTY.

PEOPLE OF THE STATE OF NEW YORK on Relation of C. HANDASYDE WHITNEY,
Relator,

vs.

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as
65 Tax Commissioners of the State of New York,
Defendants.

State of New York,
City and County of Albany, ss:

James J. Carroll, being duly sworn, deposes and says that he is over the age of twenty-one years and that he resides in City of Cohoes, New York; that on the 27th day of February, 1935, he filed with the New York State Tax Commission the security bond required by Section 155 of the Civil Practice Act to indemnify
66 the People of the State of New York against the costs and disbursements of the above entitled proceeding to review the determination of the said Commission in assessing an income tax against the relator for the year ending December 31, 1929, and deponent further says that said bond was filed in the office of Seth T. Cole, Deputy Commissioner, with the secretary of said Deputy Commissioner, who is duly authorized to receive the same, and said bond was made by The Fidelity and Casualty Company of New York on the 26th day of February, 1935.

JAMES J. CARROLL.

Subscribed and sworn to before me, this
28th day of February, 1935.
Stella F. Lane,
Notary Public.

Notice of Issue, Filed February 28, 1935. 67

STATE OF NEW YORK, SUPREME COURT,

COUNTY OF ALBANY.

PEOPLE OF THE STATE OF NEW YORK on Relation of C. HANDASYDE WHITNEY,
Relator,
against
MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Tax Commissioners of the State of New York,
Defendants. 68

Particular nature of issue and the object of the action Petition and Notice for Writ of Certiorari.

CLARK, CARR & ELLIS,
Attorneys for Petitioner-Relator.

The Clerk will please file this Note of Issue 69 for next Special Term of this Court, appointed to be held March 8, 1935.

Yours, etc.,

CLARK, CARR & ELLIS,
Attorneys for Petitioner-Relator.

70 **Order Granting Writ of Certiorari.**

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Albany, at the County Court House, in the City of Albany, on the 8th day of March, 1935.

Present: Hon. Ellis J. Staley, Justice.

71 PEOPLE OF THE STATE OF NEW YORK on Relation of C. HANDASYDE WHITNEY,
Relator,
vs.
MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Tax Commissioners of the State of New York,
Defendants.

72 Notice of application for a writ of certiorari herein having been duly served at least eight days prior to the return date of such application upon Mark Graves, John J. Merrill and John P. Hennessey, as Tax Commissioners of the State of New York, and said application having heretofore come on to be heard at a special term of this Court on the 8th day of March, 1935; upon reading and filing the notice of application, the admission of service thereof and the duly verified petition of C. Handasyde Whitney for a writ of certiorari for the purpose of reviewing an income tax for the year ending December 31, 1929, assessed and collected by the State Tax Commissioners of the State of New York against C. Handasyde Whitney, and after hearing Nelson R. Pirnie, of Counsel for

Order Granting Writ of Certiorari 73

C. Handasyde Whitney, petitioner-relator herein, in support of the application and no one having appeared in opposition thereto and due deliberation having been had thereon, it is

Ordered, that a writ of certiorari issue as prayed for in such petition, directed to Mark Graves, John J. Merrill and John P. Hennessey, as Tax Commissioners of the State of New York, and that such writ be returned to the County Clerk of the County of Albany, State of New York, and that said writ be allowed and signed 74 and sealed by the Clerk of this Court.

Entered in Albany County:

ELLIS J. STALEY,
J. S. C.

No. 506.

State of New York,
County of Albany, Clerk's Office, ss:

I, John A. Knox, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, 75 Do Hereby Certify that I have compared the annexed copy Order & Writ with the original thereof filed in this office on the 12 day of March, 1935, and that the same is a correct transcript therefrom, and of the whole of said original.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal, this 13 day of March, 1935.

JOHN A. KNOX,
Clerk.

(Seal)

Service admitted March 13, 1935, State Tax Commission by Seth T. Cole, Deputy Commissioner.

76 **Writ of Certiorari.**

PEOPLE OF THE STATE OF NEW YORK on Relation of C. HANDASYDE WHITNEY

To

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Tax Commissioners of the State of New York.

77

GREETING:

WHEREAS, we have been notified by the petition of C. Handasyde Whitney, verified the 11th day of January, 1935, that acting as Tax Commissioners of the State of New York you have assessed against and collected from the said petitioner an income tax in the sum of Two hundred and eighty dollars ($280), based upon income alleged by you to have been received by said petitioner during the calendar year ending the 31st day of December, 1929; that within
78 one year from the time when the said income tax of $280 was audited and stated by the State Tax Commissioners and on or about the 5th day of March, 1934, the said petitioner filed with the said Tax Commissioners an application for a revision and readjustment of the said income tax; that thereafter and on or about the 13th day of June, 1934, the petitioner was granted a hearing upon said application before Roy H. Palmer, Esq., First Assistant Director of the State Income Tax Bureau, it having been stipulated that the record thereof should be of the same force and effect as though taken in a

formal hearing before the State Tax Commission; that thereafter such record came before the Tax Commissioners for review; that thereafter and on or about the 17th day of December, 1934, the said petitioner received a notice dated December 10, 1934, setting forth the determination and decision of the said Tax Commissioners that the computation of the taxes and additional taxes against said petitioner for the year 1929 in accordance with the audit of the return filed was correct and that said taxes in the 80
sum of $280 so stated were properly assessed and due and did not include any taxes or other charges which should not have been lawfully demanded and that no payment had been illegally made or executed thereupon and that petitioner was not entitled to any further resettlement of the taxes so assessed; that notice of application to this Court for a writ of certiorari to review said determination has been duly given to the said Tax Commissioners on or before the 27th day of February, 1935, and within ninety days after the service on said petitioner of the notice of said determination; and said petitioner 81
claiming that said final assessment and collection of said income tax of $280 and that the said determination and decision by the said Tax Commissioners are illegal and void to the full extent of said assessment of $280 for the reasons stated in paragraph 20 of said petition, namely:

"That said alleged tax of $280 as recomputed as aforesaid is illegal and void under the laws of the State of New York and in violation of the Constitution of the United States."

82 *Writ of Certiorari*

and we being willing that justice be done in the premises,

NOW, THEREFORE, WE COMMAND that you, the said Mark Graves, John J. Merrill and John P. Hennessey, as Tax Commissioners of the State of New York, do certify and return, all and singular, the proceedings, decision and actions of the aforesaid Tax Commissioners had and made in the premises, the records of the proceedings had before them on said hearing in
83 this matter, including all papers and affidavits submitted to them and, all and singular, other matters material to the determination, assessment and collection of the aforesaid alleged income tax of $280 to the County Clerk of the County of Albany, State of New York, together with this writ, to the end that the proceedings, decisions and actions had by you as Tax Commissioners of the State of New York in the matter of the assessment, collection and determination of the aforesaid income tax may be reviewed and corrected on the merits by said
84 Court and in order that said Court may further cause to be done thereon what of right should be done.

WE DO HEREBY FURTHER COMMAND YOU to serve a copy of your said return to this Court on or before twenty days after service of said writ, on Clark, Carr & Ellis, the petitioner's attorneys, at their office No. 120 Broadway, Borough of Manhattan, City, County and State of New York.

WITNESSETH: THE HON. ELLIS J. STALEY, one of the Justices of the Supreme Court in the

Third Judicial District of the State of New York, this 8th day of March, 1935, at the County Court House, in the County of Albany, State of New York.

By the Court

JOHN A. KNOX,
Clerk.

CLARK, CARR & ELLIS,
Attorneys for Petitioner-Relator,
120 Broadway,
New York, N. Y.

The foregoing writ is hereby allowed, this 8th day of March, 1935.

ELLIS J. STALEY,
Justice of the Supreme Court
of the State of New York.

Service admitted March 13, 1935, State Tax Commission, by Seth T. Cole, Deputy Commissioner.

88 **Return to Writ of Certiorari.**

SUPREME COURT,

ALBANY COUNTY.

PEOPLE OF THE STATE OF NEW YORK on Relation of C. HANDASYDE WHITNEY,
Relator,
against
89 MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Tax Commissioners of the State of New York,
Defendants.

The above named defendants, obedient to an order of certiorari herein, granted by Mr. Justice Ellis J. Staley on the 8th day of March, 1935, hereby make return thereto consisting of all and singular, the proceedings, decision and actions of the State Tax Commission had and made in the premises, the records of the pro-
90 ceedings had upon the hearing in this matter, including all papers and affidavits submitted thereon, and all and singular other matters material to the determination, assessment and collection of the assessment of income tax to be reviewed herein as follows:

(1) New York State Income Tax Non-Resident Return for the calendar year 1929, filed by C. Handasyde Whitney; amount of tax $283; verified March 21, 1933.

(2) Claim for credit against income tax due by non-resident indicating balance of tax due $181.82; filed by C. Handasyde Whitney; verified March 21, 1933.

91

(3) Claim for refund of income taxes erroneously paid or illegally collected; amount of refund claim $181.82, filed by C. Handasyde Whitney, verified March 21, 1933.

(4) Notice of additional assessment of income tax, Notice No. 567511, dated May 5, 1933; amount $98.18.

(5) Additional claim for refund of income taxes erroneously paid or illegally collected, filed by C. Handasyde Whitney, verified April 92
20, 1933; amount of refund claim $98.18.

(6) Transcript of hearing before Roy H. Palmer, Assistant Director, Income Tax Bureau, at 30 State Street, Boston, Mass., Wednesday, June 13, 1934, including Exhibits A, B and C introduced in evidence at such hearing.

(7) Affidavit of C. Handasyde Whitney, verified the 2nd day of August, 1934.

(8) Determination of the State Tax Commission, bearing date December 10, 1934.

Defendants deny each and every allegation 93
contained in the petition herein, except in so far as the same is shown to be true by this return.

Defendants respectfully allege that the taxes imposed upon the relator herein were justly and legally imposed pursuant to the laws of the State of New York.

In Witness Whereof, The State Tax Commission hereunto sets its hand and seal this 27th day of March, 1935.

STATE TAX COMMISSION,
By

President.

JOHN J. MERRILL,
Commissioner.

JOHN P. HENNESSEY,
Commissioner.

Form 383. Page 1 of Return

NEW YORK STATE INCOME TAX NON-RESIDENT RETURN

For the Calendar Year ~~1932~~ 1929 or Fiscal Period

Begun January 1, 1929

and Ended December 31, 1929 ~~193~~

~~1932~~

Do not write in these spaces
Amount Paid
$
Cashier's Stamp
No.

To be used by individuals, NOT residents of the State of New York, deriving income from:
(a) property situated within the State of New York;
(b) a business, trade, profession or occupation carried on within the State of New York;
(c) services rendered within the State of New York.

Do not write in these two spaces

PRINT NAME AND RESIDENCE ADDRESS PLAINLY BELOW

NAME C. HANDASYDE WHITNEY
(First name in full—middle initial—last name in full)

RESIDENCE ADDRESS (No.) 344 Beacon Street, Boston, Mass.
(Street or avenue or rural route)

(City, Village, Post Office and State)

FILE AT OFFICE OF THE NEW YORK STATE INCOME TAX BUREAU, STATE OFFICE BUILDING, ALBANY, N. Y., OR AT ANY DISTRICT OFFICE, ON OR BEFORE APRIL 15, 1933

READ INSTRUCTIONS CAREFULLY BEFORE PREPARING YOUR RETURN

ANSWER QUESTIONS 1—8a IN FULL

ATTACH REMITTANCE HERE

1. Did you file a N. Y. State return for 1930? no 1931? no
1a. If so, give any address other than that above used on such returns ---- (The taxpayer has never done any
2. If no return for 1931 was filed, state reasons (business nor owned any property in N.Y. and files this return UNDER PROTEST & as to one item only
3. Is this a joint return of the income of husband and wife? no
4. If not, and your wife (or husband) filed a separate return, give name and address on such return ----------
5. Were you married and living with wife (or husband) on the last day of your taxable year? yes
6. If not, were you on the last day of your taxable year the "head of a family" as defined in Instruction F? ----
7. If your status with respect to Questions 5 and 6 changed during the year, state the date of such change no change
8. How many dependent persons (other than husband or wife) under eighteen years of age, or mentally or physically defective, were receiving their chief support from you on the last day of your taxable year? none
8a. What is the relationship to you of the dependent persons for whose support you claim exemption under Questions 6 and 8? ----

NOTE.—*If your wife (or husband) or dependent minor children derived any income from sources within the State of New York, it must be included in this or in a separate return.*

CALCULATION OF TAX

9. Net income shown by Item 30 (Page 2 of Return)	$23150	00
10. *Less* personal exemption (See Instruction F)	4000	00
11. BALANCE SUBJECT TO TAX	$19150	00

Amount of income taxable at each rate	Rate of Tax	Amount of tax	If any tax has been withheld at source from your compensation, fill in this column	Amount
$ 10,000	12. 1% on first $10,000 of Item 11	$ 100 00	16. Total tax (*Item 15*)	$ 283 00
9,150	13. 2% on next $40,000 of Item 11	183 00	17. *Less* tax withheld at source	none
	14. 6% on amount over $50,000 of Item 11	none		
$	15. TOTAL	$	18. Balance due (*Item 16 minus Item 17*)*	$ 283 00

*If Item 17 exceeds Item 16 this return will be considered as a claim for refund. No other or further claim need be filed.

The total tax due may be paid in full at the time this return is filed, or, it may be paid in three installments, one-half thereof to be paid at the time of filing, one-quarter within three months, and one-quarter within six months from the original due date.

Make checks or money orders payable to State Tax Commission. (Do not send currency by mail. Postage stamps will not be accepted in payment of tax.)

AFFIDAVIT

STATE OF MASSACHUSETTS COUNTY OF SUFFOLK, ss.:

I swear (or affirm) that to the best of my knowledge and belief, the statements contained in this return including the accompanying schedules and statements (if any) are true, and that this return is a true and complete statement, in accordance with the law and regulations, of all income, gains and profits received by or accrued to me (or the person for whom this return is made) during the taxable year 1932, from sources within the State of New York, and that all deductions entered or claimed herein are allowable under the law and regulations.

Sworn to and subscribed before me this 21st day of March, 1933.

Marcien Jenckes Notary Public

THIS RETURN IS FILED UNDER PROTEST
C. HANDASYDE WHITNEY
(Signature of individual or agent)

(Signature of officer administering oath) (Title) (Address)

19. INCOME FROM PERSONAL SERVICES (Salaries, Wages, Fees, Commissions, Bonuses, etc.)

Show the gross amount received or accrued. If deductions therefrom are claimed, report them under Item 28.

If you received compensation for services rendered partly within and partly without the State, explain in Schedule D, page 4 of return, the basis on which you apportion your income.

Do not include compensation received as an officer or employee of the United States.

Include earnings of wife (or husband) and dependent minor children from sources within the State unless reported in separate returns.

(a) OCCUPATION	(b) NAME AND ADDRESS OF EMPLOYER	FROM SOURCES WITHIN THE STATE OF NEW YORK
		$
		NONE

20. INCOME FROM PARTNERSHIPS, ESTATES AND TRUSTS

If apportionment is required, use the basis shown in the return of the partnership or fiduciary.

Give name and address of partnership, estate or trust. If estate or trust, give also name and address of fiduciary.

(a) Whitney & Elwell — $ 23,150 00

(b)

21. INCOME FROM BUSINESS OR PROFESSION (Including Farming.) See Instruction 21.

Enter here your net income from business or profession, Item 30 of Schedule A. Net income (or loss) from farming operations as computed on Farm Schedule, (Form 207), or other schedule used in lieu thereof, should be entered here, and such schedule attached to this return.

Net income from business or profession, as shown on Schedule A, or on farm schedule hereto attached — $ NONE

(If a loss, enter in red ink and subtract.)

22. INCOME FROM RENTS From Property Situated Within the State of New York

(a) KIND OF PROPERTY AND LOCATION	(b) GROSS AMOUNT OF RENTS	(c) REPAIRS, DEPRECIATION AND DEPLETION (*explain in Schedule B*)	(d) TAXES	(e) INTEREST AND OTHER EXPENSES (*explain principal items in Schedule C*)	
	$	$	$	$	
(f) NET INCOME FROM RENTS (Column b, less total of columns c, d and e). *If net loss, enter in red ink and subtract.*	$	$	$	$	$ NONE

23. PROFIT (OR LOSS) FROM SALE OR EXCHANGE OF LANDS, BUILDINGS AND OTHER PROPERTY SITUATED IN NEW YORK STATE (Not dealt in as a business)

If more than one sale or exchange was effected during the year, submit separate statement in similar form for each sale and enter total net profit (or net loss) opposite 16 of this Item.

In the case of property acquired prior to January 1, 1919, give all the information called for by both Columns 1 and 2; if acquired subsequent to January 1, 1919, give only the information called for in Column 1.

(1) Kind of property ..... (2) Location ..... (3) Year acquired — x x x x

(4) SALE PRICE (OR FAIR MARKET VALUE OF PROPERTY RECEIVED IN EXCHANGE) ..... $

COLUMN 1		COLUMN 2	
(5) Original purchase price	$	(10) Exchange value January 1, 1919	$
(6) *Add* permanent improvements since purchase		(11) *Add* permanent improvements since January 1, 1919	
(7) Total	$	(12) Total	$
(8) *Deduct* depreciation since purchase		(13) *Deduct* depreciation since January 1, 1919	
(9) Cost (line 7 less line 8)	$	(14) Adjusted January 1, 1919 value (line 12 less line 13)	$

(15) (a) If Item 4 is higher than both Item 9 and Item 14, insert here the higher of Items 9 and 14 — $

(b) If Item 4 is lower than both Item 9 and Item 14, insert here the lower of Items 9 and 14

Note: If Item 4 is neither higher nor lower than both Items 9 and 14, enter "none" and report no Gain or Loss at Item 16.

(16) Gain or loss (difference between Items 4 and 15) — $ NONE

24. OTHER INCOME From Sources Within the State of New York (Describe each source separately and in full)

Explain in Schedule D, page 4 of return, apportionment, if any to made, to State of New York, of income from any source, both within and without the State.

(a) — $ NONE

(b) — NONE

25. TOTAL INCOME FROM ABOVE SOURCES (*Items 19 to 24 inclusive*) — $ 23,150 00

26. DEDUCTIONS not claimed above

See Instruction 26.

Deductions allowable to a nonresident are limited to expenses incurred in connection with the production of taxable income from sources within the State and losses from business carried on or property owned within the State.

(a) — $

(b)

(c)

(d)

27. TOTAL DEDUCTIONS (except contributions) — $ NONE

28. BALANCE (Item 25 minus Item 27) — $ 23,150 00

29. CONTRIBUTIONS (See Instruction 29.) These must not exceed 15% of Item 28. Submit details on Schedule F, page 4 of return — NONE

30. NET INCOME SUBJECT TO TAX (Item 28 minus Item 29.) *Enter on page 1, Item 9* — $ 23,150 00

Income from business or profession carried on wholly or partly within the State of New York

(Income from farming may be detailed on Farm Schedule (Form 207), or other separate farm schedule to be attached to this return.)

If the business is carried on both within and without the State (as defined in the regulations) report the total income from the business, and exhibit apportionment in Schedule G.

1. (a) Kind of business ..... (b) Business address .....
   (c) Date when business was begun
2. State whether cash or accrual basis is used .....
3. If inventories are used, state if (a) at cost or (b) at cost or market, whichever is lower. .....

Taxpayers may submit statements attached hereto, in the form in which their books are kept, giving no less details than called for herein, and enter the net income (or loss) below.

TRADING OR OPERATING INCOME

4. TOTAL SALES AND INCOME FROM BUSINESS OR PROFESSIONAL SERVICES ..... $

COST OF GOODS SOLD		OTHER BUSINESS DEDUCTIONS	
5. Labor	$	13. Amount withdrawn by taxpayer or paid to wife or minor children (*Report as income at Item 19, page 2*)	$
6. Materials and supplies		13a. Salaries and wages not reported under "Cost of Goods Sold"	
7. Merchandise purchased		14. Rent for business property	
8. Other costs		15. Interest on business indebtedness to others	
9. *Plus* inventories at beginning of year		16. Taxes on business and business property	
		17. Repairs, depreciation and depletion (*explain in Schedule B—below*)	
10. TOTAL	$	18. Losses not compensated by insurance (*explain in Schedule C—below*)	
		19. Bad debts (*explain in Schedule C—below*)	
11. *Less* inventories at end of year		20. Other expenses (*explain principal items in Schedule C—below*)	
12. COST OF GOODS SOLD (Item 10 minus Item 11)	$	21. TOTAL OTHER BUSINESS DEDUCTIONS	$

NONE

22. COST OF GOODS SOLD PLUS TOTAL OTHER BUSINESS DEDUCTIONS (Item 12 plus Item 21) ..... $
23. NET TRADING OR OPERATING INCOME FROM BUSINESS OR PROFESSION (Item 4 minus Item 22) ..... $

NON-OPERATING INCOME OF THE BUSINESS OR PROFESSION

Do not include income from rents, or profits from the sale of lands and other property (not dealt in as a business) which must be reported on page 2 of Return at Items 22 and 23.

24. Interest ..... $
25. Dividends from stocks carried as business assets .....
26. Profit from the sale of stocks or bonds, not dealt in as a business, but carried as business assets. If you sold stocks or bonds thus held apply for Form 328. See also Instruction 21, Item 26
27.
28.
29.
30. TOTAL NET INCOME FROM BUSINESS OR PROFESSION ..... $

If you carry on business (as defined in the regulations) **only** within the State of New York, enter the amount of Item 30 of Schedule A, at Item 21 on page 2 of return.

If you carry on business (as defined in the regulations) **both** within and without the State of New York, fill in Schedules F and G on page 4 of return and enter at Item 21 on page 2 of return, the proportion of your income allocated to the State of New York.

SCHEDULE B

Details of deductions for repairs, depreciation and depletion in Item 17 of Schedule A, and Item 22 (c) on page 2 of return

If the property was acquired after January 1, 1919, base depreciation on the cost thereof. If acquired prior to January 1, 1919 show both original cost and fair market value as of that date and base depreciation on the January 1, 1919 value.

1. REFER TO ITEM NO.	2. KIND OF PROPERTY (*Principal material of which constructed*) AND LOCATION	3. YEAR ACQUIRED	4. COST (*exclusive of land*) IF ACQUIRED PRIOR TO JANUARY 1, 1919, STATE BOTH	5. VALUE ON JANUARY 1, 1919 (*exclusive of land*)	DEPRECIATION AND DEPLETION CHARGED OFF 6. RATE	7. AMOUNT SINCE PURCHASE	8. AMOUNT FOR TAXABLE YEAR 1932	9. INCIDENTAL REPAIRS NOT INCLUDED IN DEPRECIATION DEDUCTIONS
			$	$		$	$	$
	TOTALS		$	$		$	$	$

NONE

SCHEDULE C

Details of deductions claimed in Items 18, 19 and 20 of Schedule A, and Item 22 (c) on page 2 of return

1. REFER TO ITEM NO.	EXPLANATION	3. AMOUNT	4. REFER TO ITEM NO.	5. EXPLANATION	6. AMOUNT
		$			$

NONE

SCHEDULE D

Details of basis used in apportioning income, if any, earned partly within and partly without the State of New York.

1. Refer to Item of return	2. Explanation
	The only income reported is that received through my firm on account of the sale of a New York Stock Exchange seat "right".

SCHEDULE E

Details of contributions to the State of New York, or any political subdivision thereof, for exclusively public purposes; or to charitable, religious, scientific and educational corporations, incorporated by, or associations organized under, the laws of the State of New York claimed as deduction at Item 29 on page 2 of return.

1. NAME AND ADDRESS OF ORGANIZATION	2. AMOUNT	3. NAME AND ADDRESS OF ORGANIZATION	4. AMOUNT
	$ None		$

SCHEDULE F

If you carry on business (as defined in the regulations) both within and without the State of New York, give list of all places, both within and without the state, where you carry on business.

Line No.	1. STREET ADDRESS	2. CITY AND STATE	3. DESCRIPTION (Branch office, agency, factory, etc.)
1	My only place of business is		
2	30 State Street	Boston, Mass.	
3			
4			
5			

SCHEDULE G

Allocation of factors used in apportionment of income, in accordance with method prescribed in Article 457 of the New York State Income Tax Regulations.

To be submitted only by nonresidents carrying on business (as defined in the regulations) both within and without the State of New York

Line No.	1. DESCRIPTION OF ITEMS USED AS FACTORS	2. TOTALS (Within and without the State)	3. NEW YORK STATE AMOUNTS
1	(1) VALUE OF THE REAL AND TANGIBLE PERSONAL PROPERTY OF THE BUSINESS	XXX XXX XXX XX	XXX XXX XXX XX
2	(a) At the beginning of the period covered by the return	$	$
3	(b) At the end of the period covered by the return		
4	TOTAL OF LINES 2 AND 3	$	$
5	AVERAGE—[half of amounts on line 4] None	$	$
6	(2) WAGES, SALARIES AND OTHER PERSONAL SERVICE COMPENSATION PAID DURING THE YEAR		
7	(3) GROSS SALES OF MERCHANDISE, OR CHARGES FOR SERVICES, DURING THE YEAR		
8	TOTALS	$	$
9	Enter the percentage which the total (line 8) of Column 3 is of the total of Column 2 ... %	Apply this percentage to Item 30 of Schedule A and enter at Item 21 on page 2 of Return.	

This Space for Office Use Only

Audited By

.....

Form IT 112. 3-7-33-3000 (2-4000)

NEW YORK STATE INCOME TAX

CLAIM FOR CREDIT

AGAINST INCOME TAX DUE TO STATE OF NEW YORK BY A NONRESIDENT INDIVIDUAL FOR TAXES PAID OR DUE TO THE STATE OR COUNTRY OF HIS RESIDENCE FOR THE YEAR 19.....

RECEIVING STAMP

THIS CLAIM SHOULD BE ATTACHED TO RETURN FILED BY CLAIMANT

NAME

C. HANDASYDE WHITNEY

(First name in full — middle initials — last name in full)

RESIDENCE ADDRESS

(No.) 344 Beacon Street (Street or avenue or rural route)

(City or town) Boston (State) Mass.

Name and address should be identical with name and address on return

IMPORTANT

A copy of return of income to State where claimant resides MUST be filed herewith for proper audit of claim

STATEMENT OF CLAIM

1 Claimant is a resident of State of Massachusetts

2 The following items were included in the return of income to the State where the claimant resides and were also included in the return of income on Form 203 filed with the New York State Tax Commission.

Interest in profit on sale of right accruing on seat on the New York Stock Exchange owned by the firm of	$	
Whitney & Elwell and standing in the name of C.Handasyde	$	23,150.00
3 Amount of tax paid or payable to State where claimant resides ... Whitney	$	101.18

4 Other information The tax paid was at the rate of 3% but there were authorized deductions from the above item of profit leaving tax payable on only $3,372.58

5 Total amount of tax payable to New York State (Form 203)	$283.00
6 Amount of credit claimed	$101.18
7 Balance of tax due New York State	$181.82

AFFIDAVIT State of Massachusetts County of Suffolk ss:

I swear (or affirm) that to the best of my knowledge and belief the statements made above in support of my claim for credit are true and complete.

Sworn to and subscribed before me this 21st day of March 1933.

C. Handasyde Whitney

(Signature of individual or agent)

Marcien Jenckes (Signature of officer administering oath) (Seal not required)

Notary Public (Title)

(Address of agent)

PROVISIONS OF STATE INCOME TAX REGULATIONS RELATING TO CREDIT FOR TAXES

ALLOWANCE OF DEDUCTIONS AND CREDIT

ARTICLE 482. *Credit for taxes.*—A taxpayer not a resident of the State of New York who has become liable to income tax to the state or country wherein he resides, upon his net income for the taxable year derived from sources within the State of New York shall be credited with such proportion of the tax payable by him to the state or country wherein he resides as his income subject to taxation under the New York State Income Tax Law bears to his entire income upon which the tax so payable to such other state or country was imposed; provided only if the laws of such state or country grant a substantially similar credit to residents of New York State subject to income tax under such laws, or impose a tax upon the personal incomes of its residents derived from sources in this State and exempt from taxation the personal incomes of residents of New York State. (*Tax Law, section 363.*)

Amount of "taxes payable" means taxes only (no credit being given for amounts representing interest or penalties) paid or accrued during the taxable year on behalf of the individual claiming credit. "Other state or country" includes within its meaning territories, possessions, states and any foreign sovereignty.

ARTICLE 483. *Conditions of allowance of credit.*—When credit is sought for income taxes paid to other states or countries pursuant to the Tax Law, Section 363 (see *Article 482*) the income tax return form of the individual must be carefully filled out with all the information called for therein and there must be attached to and filed with the return a claim for credit (Form 112) upon which all the information called for must be given. When the Tax Commission receives proof that any other state or country allows a substantially similar credit, or imposes no tax upon and with respect to personal incomes of residents of this State within the meaning of Section 363 of the Tax Law, that fact will be announced from time to time by amendment to this article.

Since the commonwealth of Massachusetts and the State of Delaware in imposing their respective income taxes, impose no tax upon residents of this State with respect to personal income received from sources within their jurisdictions, residents of Massachusetts and residents of Delaware are allowed the credit provided for in section 363 of the Tax Law against any tax due from such residents to the State of New York.

ARTICLE 484. *Redetermination of tax when credit proves incorrect.*—In case credit has been taken and allowed for taxes accrued, or a proportionate share thereof, and the amount that is actually paid on account of such taxes, or a proportionate share thereof, is not the same as the amount of such credit, or in case any tax payment credited is refunded in whole or in part the taxpayer shall immediately notify the Tax Commission. The Tax Commission will thereupon redetermine the amount of the income tax of such taxpayer for the year or years for which such incorrect credit was granted. The amount of tax, if any, due upon such redetermination shall be paid by the taxpayer upon notice and demand by the Tax Commission. The amount of tax, if any, shown by such redetermination to have been overpaid shall be immediately refunded to him. (*Tax Law, section 377 and article 471-474.*)

Exhibit 3 of Return. 109

CLAIM FOR REFUND

INCOME TAXES

Erroneously Paid or Illegally Collected

This claim should be forwarded to New York State Income Tax Bureau, State Office Building, Albany, N. Y.

State of Massachusetts, Year 1929
County of Suffolk, ss: 110

Print Name of Claimant C. Handasyde Whitney
(This should agree with name on return)
Address 344 Beacon Street, Boston, Mass.

The deponent, being duly sworn, deposes and says that this claim is made on behalf of the claimant named above, and that the facts stated below with reference to the claim are true and complete.

1. Year for which claim is made 1929.
2. Amount of Refund now claimed $181.82. 111
3. Amount of Tax paid $181.82.

Deponent verily believes that the amount stated in Item 2 should be refunded and now asks and demands refund of said amount for the following reasons:

(1) The taxpayer is a resident of Massachusetts and has never carried on any trade, business, profession or occupation in New York;

(2) The taxpayer has never owned any property in New York;

(3) The taxpayer, either individually or as a

112 *Exhibit 3 of Return*

member of a partnership, has never had a place of business in New York State;

(4) The membership in the New York Stock Exchange owned by the taxpayer and his partners was not property owned by him or his partners in the State of New York;

(5) The taxation by the State of New York of the taxpayer's interest in the sale of a "right" accruing on membership in the New York Stock
113 Exchange owned by the taxpayer and his partners is illegal, void and contrary to law and particularly in violation of the Fourteenth Amendment to the Constitution of the United States of America;

(6) The provisions of the Constitution of the United States of America as amended prevent the assessment against the taxpayer of the tax assessed and paid under protest:

5. Deponent further alleges that no claim has heretofore been presented for the refunding of the whole or any part of the amount stated in
114 Item 2, and that no part has heretofore been refunded to claimant.

C. HANDASYDE WHITNEY
(Name)

Sworn to and subscribed before me this
21st day of March, 1933.
Marcien Jenckes,
(Name)
Notary Public.
(Title)

Exhibit 4 of Return. 115

COPY

NEW YORK STATE-DEPARTMENT OF TAXATION AND FINANCE

INCOME TAX BUREAU

Notice of Additional Assessment of Income Tax

No. 567511

Albany, N. Y.
Date May 5, 1933 116

C. Handasyde Whitney, (71762)
344 Beacon St.,
Boston, Mass.

YOU MAY KEEP THIS NOTICE

Payment must be made within ten days.

The audit of your State income tax return for 1929 discloses additional tax due from you as stated below.

117

Explanation:	Amount of tax due
Additional tax from disallowance of credit claimed as per Form 112—no tax having been paid to the State of Massachusetts upon the sale of the New York Stock Exchange Right.	
Paid Check Attached	$98.18
RD/MMcK	

118 *Exhibit 4 of Return*

If not paid within ten days from date hereof there shall be added to the amount of this assessment 5% thereof, and in addition, interest at 1% per month for each month or fraction of a month from the date of this notice. (See Tax Law, Sec. 377, Subdiv. 3.)

The foregoing tax is hereby assessed as indicated herein.

THE STATE TAX COMMISSION

119 Payment may be made at any office of the New York State Income Tax Bureau.

Make checks payable to the State Tax Commission.

120

Exhibit 5 of Return. 121

COPY

Additional

CLAIM FOR REFUND

INCOME TAXES

Erroneously Paid or Illegally Collected

This claim should be forwarded to New York State Income Tax Bureau, State Office Building, Albany, N. Y. 122

(Receiving Stamp): Received New York State Income Tax Bureau April 21 1933 Albany Office

State of Massachusetts, Year 1929
County of Suffolk, ss:

Print Name of Claimant C. Handasyde Whitney
(This should agree with name on return)
Address 344 Beacon Street
Boston, Mass.

The deponent, being duly sworn, deposes and says that this claim is made on behalf of the claimant named above, and that the facts stated below with reference to the claim are true and complete. 123

1. Year for which claim is made 1929.

2. Amount of Refund now claimed $98.18.

3. Amount of Tax paid $98.18.

Deponent verily believes that the amount stated in Item 2 should be refunded and now

124 *Exhibit 5 of Return*

asks and demands refund of said amount for the following reasons:

(1) The taxpayer is a resident of Massachusetts and has never carried on any trade, business, profession or occupation in New York;

(2) The taxpayer has never owned any property in New York;

(3) The taxpayer, either individually or as a member of a partnership, has never had a place
125 of business in New York State;

(4) The membership in the New York Stock Exchange owned by the taxpayer and his partners was not property owned by him or his partners in the State of New York.

(5) The taxation by the State of New York of the taxpayer's interest in the sale of a "right" accruing on membership in the New York Stock Exchange owned by the taxpayer and his partners is illegal, void and contrary to law and particularly in violation of the Fourteenth Amendment to the Constitution of the
126 United States of America;

(6) The provisions of the Constitution of the United States of America as amended prevent the assessment against the taxpayer of the tax assessed and paid under protest.

(7) Deponent further alleges that no claim has heretofore been presented for the refunding of the whole or any part of the amount stated in Item 2 and that no part has heretofore been refunded to claimant.

(8) Claim for refund of $181.82 being tax

Exhibit 5 of Return

paid in March of 1933, has been filed on the above outlined grounds. This additional claim for refund is filed in connection with the same tax but on account of additional amount of tax set forth herein but paid subsequent to the original payment of March 21, 1933 in accordance with letter from Messrs. Choate, Hall & Stewart dated April 20, 1933.

C. HANDASYDE WHITNEY
(Name)

Sworn to and subscribed before me this
20th day of April, 1933.

Marcien Jenckes
(Name)
Notary Public.
(Title)

130 **Exhibit 6 of Return.**

Minutes

STATE OF NEW YORK

STATE TAX COMMISSIONER—INCOME TAX BUREAU.

IN THE MATTER

of

131 Application of C. HANDASYDE WHITNEY for revision and readjustment of personal income taxes assessed for the year 1929.

Hearing before Roy H. Palmer, Assistant Director, Income Tax Bureau, at 30 State Street, Boston, Massachusetts, on Wednesday, June 13, 1934, commencing at 3 P. M.

132 Appearance:

Marcien Jenckes, Esq., for applicant.

Stipulation.

It is hereby stipulated that the petitioner herein waives the formal hearing provided under Section 374 of the New York State tax law, and stipulates that the testimony and record taken herein shall be of the same force and effect as though taken in a formal hearing before the State Tax Commission, and shall become the basis for a formal determination of the Commission under Section 374.

Exhibit 6 of Return 133

It is further agreed that the New York Stock Exchange is a voluntary association which consisted of 1,100 members for some time prior to 1929; that about March 1, 1929, by proper resolutions of the association members, the membership was increased twenty-five per cent to 1,375; that the holder of a membership became entitled, in addition to his membership, to a so-called right for one-quarter of a new membership, four of said rights together entitled the holders to one of the new memberships; that a membership or seat in the New York Stock Exchange carries with it valuable privileges and has a market value for the purpose of sale; that the New York Stock Exchange is an unincorporated voluntary association, limited as to membership, governed by its own constitution, by-laws and rules; that such association holds the beneficial ownership of the entire capital stock of a New York corporation which owns the building in which the business of the Exchange is transacted, with the land upon which it stands and which is situated in the City and State of New York; that a member may personally buy or sell only in the Exchange building; that a member of the Exchange may buy or sell for the account of other members at a commission substantially less than that charged to a non-member; that such rights and privileges are valuable and are exercisable only in transactions conducted at the New York Stock Exchange building in the City and State of New York.

134

135

136 *Exhibit 6 of Return*

C. HANDASYDE WHITNEY, having been duly sworn by said Assistant Director, testified in answer to questions by Mr. Jenckes, as follows:

Q. What is your full name, Mr. Whitney? A. Charles Handasyde Whitney.

Q. And you live in Boston? A. I live in Boston.

Q. How long have you lived in Boston? A. Practically all of my life.

137 Q. Have you ever had a domicile anywhere else than in Massachusetts? A. No.

Q. Have you had any place of business or domicile in the State of New York? A. No.

Q. What is your business, Mr. Whitney? A. Stock broker.

Q. You are a member of the firm of Whitney & Elwell? A. Yes.

Q. With offices at 30 State Street, Boston? A. Yes.

Q. Who are your partners? A. William D. Elwell, Geoffrey G. Whitney—

138 Q. Who is your brother? A. My brother, yes. —J. Chester Hutchinson, and Ernest H. Freeman.

Q. Was Mr. Freeman a partner in 1929? A. No.

Q. So that the only partners in 1929 were yourself, your brother, Mr. Hutchinson, and Mr. Elwell? A. Yes.

Q. What is the business of your partnership, Mr. Whitney? A. Buying and selling securities on commission. General brokerage business.

Q. And your firm advertises itself, does it not, as a member of the New York Stock Exchange? A. Yes.

139 Q. You are the person in whose name the membership stands? A. Yes.

Q. When did you become the owner of the membership of the New York Stock Exchange? A. In March, 1909.

Q. What did you pay for the seat at that time, Mr. Whitney? A. $77,000.

Q. Was that membership on the New York Stock Exchange in 1929 owned by you entirely? A. No, it was a firm asset.

140 Q. In what proportion was the New York Stock Exchange seat owned by you? A. Divided evenly amongst the four partners. 25 per cent each.

Q. Where does your brother live? A. In Milton.

Q. Where does Mr. Hutchinson live? A. In Lexington.

Q. Where does Mr. Elwell live? A. Arlington.

Q. And they have all been partners connected with the firm since 1909? A. Yes.

141 Q. Have they, or any of them, had any business— A. Excuse me one minute. I think Mr. Hutchinson may have come in, and my brother, just shortly after that. It may have been 1910.

Q. But since the year 1909 or 1910— A. It was very shortly afterwards. Essentially from then on.

Q. Certainly since the beginning of the year 1911? A. Oh, yes.

Q. You have been the four partners there? A. Yes.

Q. Have any of your partners at any time had any domicile in New York State, Mr. Whitney? A. No.

142 *Exhibit 6 of Return*

Q. Or have they individually or as a firm even done any business in New York State? A. No.

Q. In 1929, Mr. Whitney, I believe the New York Stock Exchange issued rights to the members of the Exchange who were at that time the record owners of the memberships on the Exchange? A. Yes, that is correct.

Q. And you received such a right? A. Yes.

Q. How many rights did it take to become
143 entitled to a new membership? A. It took four rights. Well, whether it is four in all or four and the other one I can't seem to remember. Have you the memorandum there?

Q. Yes, I am showing it to you (handing). Refreshing your recollection from this memorandum, is it correct that the rights attached to four memberships, when combined together, entitled the owners of those four rights to one new membership? A. That is it; four.

Q. So that the membership of the Exchange was increased 25 per cent? A. Yes, I remember that. 375 members.

144 Q. An increase of 275? A. 275 in all, yes. Yes, it took four rights combined to make one membership.

Q. The right attaching to your membership was sold in 1929, was it not, Mr. Whitney? A. Yes.

Q. For how much? A. $108,000.

Q. Your firm never had any office in New York State, did it? A. No.

Q. In the course of your business as a general securities and commission business, does your firm buy and sell securities on the Boston market and execute orders on that market, on

145

the Boston Stock Exchange, where certain stocks listed on the New York Stock Exchange are also traded in? A. Yes.

Q. Do you also take orders for execution on the New York Stock Exchange? A. Yes.

Q. And that constitutes a considerable portion of your business, does it? A. Yes.

Q. How are those orders executed, Mr. Whitney? A. Those are transmitted to our correspondent in New York over the wire, and they executed the orders for us in our name. Our

146

name does not appear except on their books.

Q. When you said execute the orders for you, you mean they go to the floor of the New York Stock Exchange and actually buy and sell securities as ordered by you? A. Yes.

Q. In that transaction of purchase or sale on the floor of the Exchange does your name appear? A. Oh, no.

Q. In 1929 who were your correspondents, Mr. Whitney? A. F. B. Keech & Company, Harris, Upham & Company, and E. F. Hutton & Company.

147

Q. When your correspondents buy on order from you, do they do that business in their own name, Mr. Whitney? A. Yes.

Q. And do they send wire reports to you of the execution of these orders? A. Yes.

Q. And written reports which you receive the following day? A. The following day, right.

Q. Do you carry open accounts with your New York correspondents? A. We do.

Q. Those open accounts which you carry with your New York correspondents are margin accounts, where you owe them money and have securities up on the account as collateral; is that correct? A. That is correct.

148 *Exhibit 6 of Return*

Q. And as the indebtedness incurred by them in the purchase of the securities increases, you supply margin as required? A. Exactly.

Q. And the matter of margin arrangements is a matter of mutual agreement between you and your correspondents; is that correct? A. That is correct.

Q. What was the nature of the business arrangement that you had with your New York correspondents in 1929, Mr. Whitney? A. The commissions, you mean?

149 Q. No, was it a written or oral arrangement, I meant first? A. I think it was probably oral, although there may have been letters back and forth. It is quite probable that there were.

Q. You had been doing business with those particular correspondents that you mentioned for some time prior to 1929? A. Yes; oh, yes. There are undoubtedly lots of letters back and forth. We changed the arrangement from time to time, you know.

Q. In substance, Mr. Whitney, did the arrangement which you had with your New York
150 correspondents in 1929 provide as follows: A. All arrangements between brokers and wire houses are practically the same. They do not vary much.

Q. Does this paper, entitled "Customer's Agreement," bearing the firm signature of Whitney & Elwell, Mr. Whitney, in substance state the arrangements on which you carried all of the accounts which you had with your correspondents in New York in 1929? A. This is it in substance. I have seen these before, of course. (Peruses.) Yes, that is the general form.

Q. It contains, does it not, the substantive provisions which were incorporated in any oral arrangement that you had with your New York correspondents, where that oral arrangement was not confirmed in writing? A. Yes. Some of the details we usually put in writing, but this is the usual form which is used.

Mr. Palmer: What was the date of this paper that you are reading from, Mr. Whitney?

The Witness: December 4, 1929.

Q. So that you are a customer of the New York firm? A. Yes.

Q. And that is the form supplied to you by the New York house and signed at their request, is it? A. Yes.

Q. That is the way that the arrangements were made where they were not in writing? A. Yes, this is the same result.

Mr. Jenckes: I will introduce this in evidence.

Photostat copy of Customer's Agreement marked "Exhibit A."

Q. What charge do your correspondents make to your firm, Mr. Whitney, for the execution of orders in New York on the New York Stock Exchange? A. They charge me 40 per cent of the full commission.

Q. By "the full commission" what do you refer to, Mr. Whitney? A. That is the commission that we charge and they charge their customers.

Q. That is prescribed by the rules of the New York Stock Exchange, is it? A. Yes, that is right.

Q. So for any business they do for you on the New York Stock Exchange as your correspondents they get 40 per cent and you get 60 per cent? A. Yes.

Q. And the total figure by which those percentages are figured is the commission which would be charged by them to an individual customer who came to their offices in New York? A. Yes, exactly.

Q. And it is the same charge you would make or do make to an individual customer who comes to your office in Boston? A. Yes, exactly.

Q. So any member of the New York Stock Exchange who takes an order for execution on the New York Stock Exchange has to charge the commission fixed by the rules of the Exchange in connection with the selling price of the stock? A. Yes.

Q. And how is the division between you and your New York correspondents arrived at? A. That is by mutual agreement entirely. There is a limit, a minimum limit set by the Stock Exchange. That is all.

Q. By that minimum limit, you mean the New York correspondent cannot do it for less than a certain amount? A. They have to charge us a commission, which varies on the different stocks, but it is around $3.50. That would be close to about 35 per cent.

Q. Is the commission charged by your firm to your customer fixed by the rules of the Exchange? A. That is fixed by the Exchange.

Q. And is that the same amount which the New York correspondent would be obliged to charge a customer if that customer dealt di-

157

rectly with the New York correspondent? A. Exactly the same.

Q. And were these arrangements outlined in this Exhibit A, Mr. Whitney, the same as you had throughout the entire course of business of your firm from 1929 to the present date? A. Yes, I should say they were exactly the same.

Q. Are there dues to the New York Stock Exchange, Mr. Whitney? A. Yes, regular dues during the year.

Q. And those, I take it, are paid by your firm? A. They are paid by the partnership. 158

Q. Is there also a gratuity fund? A. There is a gratuity fund.

Q. And that provides, does it not, in substance, that on your death as a member your membership can be disposed of by the committee and your widow and descendants are entitled to certain payments out of a fund known as the "guaranty fund," which in substance is an insurance fund? A. It is an insurance fund.

Q. And the payments to that fund, are they made personally by you? A. They are made personally by me. 159

Q. At times, Mr. Whitney, have there been assessments by the New York Stock Exchange in the nature of capital advances made by the Stock Exchange for capital purposes? A. I believe there have.

Q. And have you determined from the New York Stock Exchange what that amounted to prior to 1929? A. That has been worked out, I believe.

Q. And do you recall what that figure was? A. Let me see. The total amount was $600.

Q. $600 represents one-fifth of the contributions, does it not, Mr. Whitney? A. Yes.

160 *Exhibit 6 of Return*

Q. And the $600 figure came in in calculating the addition to the cost of your seat by reason of those additional capital advances? A. Yes.

Q. So that the total capital contributions were $3,000? A. $3,000.

Mr. Jenckes: I do not understand, Mr. Palmer, that you raise any question about that fact, do you, in connection with the reporting of the returns?

Mr. Palmer: No.

161 Q. How is the membership in the New York Stock Exchange evidenced, Mr. Whitney? A. Merely by paying a check and signing a book.

Q. Do you get a letter or anything from the secretary of the Exchange? A. Yes, I believe we got a letter, saying you have been admitted to membership. I can't remember seeing that, but all members have a printed document stating that the firm is a member of the New York Stock Exchange.

Q. How can that membership be transferred, Mr. Whitney? A. Only through the Stock Ex-
162 change and with its approval.

Q. You have paid a tax, have you not, Mr. Whitney, to the State of New York on account of an assessment on the profit resulting from the sale of your interest in this right? A. I have.

Q. You have filed an application for refund in connection with that payment? A. I have.

Q. And is that true also of your three partners who are equally interested in the seat with you? A. Yes.

Mr. Jenckes: I think I have covered everything, Mr. Palmer.

Exhibit 6 of Return 163

CROSS-EXAMINATION by Mr. Palmer:

Q. Mr. Whitney, you stated that you were, in 1929, domiciled in Massachusetts, and that you had never been domiciled in New York State. Did you ever have a place of abode in New York State? A. No.

Q. You did not have any place of abode, in 1929, in New York State? A. No.

Q. How much time did you spend in New York City or New York State during the year 164
1929, if any? A. I do not think I have been over there, even. Well, not more than two or three days at the most. I very rarely go to New York.

Q. In the conduct of your business is it your custom, or the custom of any of your partners, to go to New York with any frequency? A. No. They come to see us as a rule.

Q. How often would you say any of your partners in 1929 visited New York on the affairs of the partnership? A. I could not say; but I should say very seldom.

Q. Was it the custom to make periodic visits 165
to New York? A. No, just when occasion called to see our correspondents.

Q. When an occasion did call, what was the nature of the business transacted in New York? A. It was merely to talk over conditions and get suggestions and really more or less of a social call, you might say.

Q. Did you give any orders to buy or sell, you or your partners, when you went to New York? A. No, that was all conducted here, from this end. It is possible somebody might have entered an order but it was reported to us, just as it is given here.

166 *Exhibit 6 of Return*

Q. Was it your custom to enter into syndicate transactions with New York houses in 1929? A. We participated or were given or allotted participations, I should say, in underwritings in 1929 to a small extent.

Q. How many, would you say? A. Oh, it is very hard to say. I would hate to make any exact statement. Perhaps ten to a dozen or more.

Q. Did you, or any of your partners, go to New York to discuss participation in these syn-
167 dicates or underwritings? A. I should say not. They notify us by letter and are very apt to call up on the telephone.

Q. You did not seek those participations? A. No, they were sent to us in the regular course of business, and we can take them or not as we want to. An underwriting house will allot to their correspondents and friends a certain number of shares in a syndicate. If you take any you may resell it to your customers.

Q. The place of business of your partnership in Boston is No. 30 State Street? A. Yes.

Q. You do a general brokerage business? A.
168 Yes.

Q. As members of the Boston Exchange? A. Yes.

Q. And of the New York Stock Exchange? A. Yes.

Q. You advertise yourselves in Boston as members of the New York Stock Exchange? A. Yes.

Q. And you accept orders from customers at your Boston office for execution on the New York Stock Exchange? A. Yes.

Q. At the time the customer places his order with you to buy or sell, does he know whether or

not you are executing that on the Exchange? A. Oh, yes, of course. There is no place else.

Q. I mean does he know whether your firm is doing it through your membership or whether some other New York Stock Exchange firm is executing the order? A. He knows that it is being done through our correspondent because we have no office there.

Q. Does your customer know that? A. I presume so.

Q. You do not tell him, do you, that you have 170
no office in New York, or that you are not actually buying or selling that stock on the Exchange? A. Well, I should say we would certainly if they asked us.

Q. But you are not generally telling your customers that beforehand, unless they do inquire? A. Well, I tell you this: If a customer asks how our orders are executed, we say we send them over to our New York correspondent, whoever it may be, and they execute the order for us. I imagine everybody knows.

Q. But if he does not inquire, why, you do not inform him? A. No, on our letterheads we 171
do not show any—

Q. Your letterheads and your signs on the doors and windows say merely "Members of the New York Stock Exchange," I assume? A. Our letterhead shows just one office, too, 30 State Street. No branches.

Q. When a customer buys or sells through you, you have him sign a customer's agreement, do you not, similar to the one which has been exhibited here as Exhibit A? A. We do not have to do that in Massachusetts.

Q. Do you not have to have the customer sign

172 *Exhibit 6 of Return*

any agreement permitting you to hypothecate his stock as collateral? A. No, not as yet.

Q. Is not that a rule of the Stock Exchange? A. No, not to my knowledge. I was trying to think. On all our orders—this has come up a great many times—on all our orders, when an order is put in, that appears on the order blank.

Q. The fact is, however, that when a customer buys on margin you do hypothecate the stock? A. Yes.

173 Q. Now, when you transmit the order to your correspondent in New York, he executes the order on the Exchange? A. Yes.

Q. You say that he does not know your customer? A. No.

Q. But he knows that you are buying for a customer, I take it? A. Well, I presume so, as we are.

Q. Now, if the stock is purchased through you by a customer, you hypothecate his stock to carry your own account with your correspondents; is that right? A. That stock is usually left over in New York on our account there. Some-

174 times it is brought over to Boston, to suit our convenience, really. Sometimes it goes into a loan; sometimes it goes right into our box. That is simply our option. We can do as we want with it.

Q. When it is purchased on margin, for instance, you have a bank balance in New York at all times? A. We have a bank balance there which is merely for the convenience of drawing a check on New York if we wish to. We very seldom do it.

Q. How much of a balance do you carry there ordinarily? I am speaking of the partnership,

175

of course. A. Yes. Well, from $5,000 to $10,000. It is very small.

Q. What percentage of the orders that you place through your New York correspondents is for customers and what for your own account, if any? A. 999 out of 1,000 are our customers.

Q. You mean in number of accounts? A. Yes. We do not speculate as a firm at all. The partners may occasionally buy stocks, as they do.

Q. During the year 1929 you were dealing with three Stock Exchange firms in New York? 176
A. Yes.

Q. Keech, Hutton and Upham? A. Harris & Upham, yes.

Q. Have you any idea what your transactions with those firms amounted to in that year? A. It would be impossible for me to say without looking it up. I really haven't the vaguest idea.

Q. What percentage of your business was represented by orders transmitted to your New York correspondents in 1929? A. As a very inaccurate guess, I should say three-quarters. It might vary.

Q. What percentage of your sales in 1929 177
were on marginal basis, let us say? I am speaking of those transmitted through New York. A. Purchases and sales?

Q. Yes. A. You understand these answers are very much of a guess. I should say nine-tenths.

Q. And in the case of that nine-tenths, assuming that is a fair estimate, would you say that in the great majority of those cases the securities purchased were held in New York by your New York correspondents as collateral? A. I can tell you a little more accurately on that. At the height of the bull market three-quarters of

178 *Exhibit 6 of Return*

our stocks were in New York. It has changed considerably since, of course. That is merely a rough guess, too.

Q. On your order confirmation slips there which you have presented it appears that your firm notified the customer, at least, that it was your understanding that you were permitted to hypothecate the securities acquired on marginal account? A. Yes.

Q. For any unpaid part of the purchase price
179 or sales price? A. Yes.

Q. Now, when you transmitted an order to New York you had to sign an agreement, did you not, with the New York firm permitting them to hypothecate any securities that you purchased through them? A. Yes.

Q. So that you, in turn, hypothecated any securities which the customer had agreed that you should hypothecate? A. Yes.

Mr. Palmer: I should like to put those in evidence, Mr. Jenckes.

Order confirmation and sale confirma-
180 tion marked Exhibit B and Exhibit C respectively.

Q. In paying your New York correspondent for any securities, I assume that that was a bookkeeping transaction at the end of each day showing a debit or a credit balance on purchases and sales; is that true? A. They merely credited, charged our open account with them.

Mr. Jenckes: For each transaction during the day. I got the impression from your question that you suggested it was all one lump transaction.

Q. No, it was either a debit or a credit for the day? A. Yes. 181

Q. There was not a check sent by you for each transaction? A. No, no, indeed.

Q. How often did you have a settlement? A. We never have any settlement unless the account is closed out. We have settled and closed up two accounts since the year of 1929.

Q. When a customer gives you an order on margin in Boston which is transmitted to New York you required, in 1929, a certain margin of the customer. Was that the same margin which 182 was required by your correspondents in New York? A. Well, practically the same. It depends a good deal on the credit of the customer and the kind of stocks he buys.

Q. In other words, did you have to carry a margin with your correspondents in New York? A. Yes, we had a minimum margin requirement, which I do not recollect, as we always carried a great deal more than was necessary there.

Q. It did not always correspond, however, with the marginal account which you had in the Boston office? A. Oh, no. It may be a great 183 deal more or a great deal less. They had a minimum requirement. It was more a man's credit—although there is a minimum requirement by the Stock Exchange at the present time.

Q. In 1929, what were the commissions charged for the purchase and sale of stocks on the New York Stock Exchange? A. Varying prices for the different prices of the stocks. I would have to give you a list. It ranged from 7 1/2 cents up to $25 or $30. There is a regular commission card which I can give you if you wish it.

184 *Exhibit 6 of Return*

Mr. Jenckes: Would you like to have that commission card set out in detail, Mr. Palmer?

Mr. Palmer: It might be helpful to have it in the record.

Q. In any event, whatever those commissions were, you were credited and received from your correspondents 40 per cent of the regular commission? A. They charged us at the rate—you can put it that way—charged at the rate of 40
185 per cent of the total commission.

Q. They charged 40 or you received 40? A. They charged 40. We received 60, and they received 40.

Q. How was that handled as between you? A. That was just an agreement.

Q. Was that entirely oral? A. I think we probably had letters on that, too.

Q. In this customer's agreement, of course, I take it that has nothing to do with your agreement as between the correspondents and yourselves as to commissions? A. No.

186 Q. The New York Stock Exchange has fixed the rates of commission for the purchase and sale of securities? A. Yes, for non-members.

Q. You charge your customers with the fixed rates? A. Yes, exactly.

Q. When you buy and sell through your correspondent, he charges you only 40 per cent of that rate? A. I might say here that the rates on odd lots are a little higher than on round lots, and they vary in that way; so that, in the case of odd lots, our percentage might be more than 60 per cent of the whole. I do not know that that has any bearing on the thing at all. Each house has a minimum they can charge but

there is no end of the maximum, of course. You could charge $10 for one share if you wanted to. You naturally would not, because you would not get any business.

Q. Under the customer's agreement, Exhibit A, which represents the agreement signed by Whitney & Elwell with Harris, Upham & Company, in paragraph 2 you constitute Harris, Upham & Company as your agents; likewise, in the third paragraph from the end of the agreement, Harris, Upham & Company are referred to as 188
"the undersigned's agent." Do you so recognize them as your agents, Mr. Whitney? A. Well, I have always recognized them as our agents for executing the orders.

Q. For the purposes as set forth in that agreement? A. Yes.

Q. Now, the 60 per cent of the commission which you charge your customer for the execution of orders can only be paid to you, under the circumstances, as a member of the New York Stock Exchange; is that not so? In other words, your correspondent would not be permitted, under the rules of the Stock Exchange, to split 189
commissions with any outside person or firm? A. No, that is correct.

Q. And it is only by virtue of your membership in the New York Stock Exchange that he charges you only 40 per cent rather than the full commission? A. That is right.

Mr. Palmer: I think that is all.

RE-DIRECT EXAMINATION by Mr. Jenckes:

Q. At your correspondents' offices in New

190 *Exhibit 6 of Return*

York, Mr. Whitney, I understand that you owe them money on account of transactions which they have executed for your account, and they hold the securities purchased and others that you may send as collateral on the account? A. They do.

Q. So that there is an indebtedness that you owe in New York? A. Yes.

Q. On the accounts of correspondents over there? A. Yes, that is correct.

191 Q. So far as payment and delivery for any securities bought for your account in New York is concerned, do you have anything to do with that completion of the transaction on it? A. No, nothing whatever.

Q. In other words, the whole transaction from the execution of the order on the Exchange to the purchase and payment for the stock bought is handled in New York? A. Entirely.

Q. Did any of your partners ever have a place of abode in New York, Mr. Whitney? A. No, not to the best of my knowledge and belief. I never heard of their living there as long as I 192 have known them, since 1909. They may have been before that but I am sure they have not since.

Q. You have private wires to your New York correspondents in each case so that orders and instructions go over those wires every day? A. Yes, that is correct.

Q. Have you or any of your partners ever done any business on the floor of the New York Stock Exchange? A. No, never.

Q. So that at any time when you have been to New York, has there been any occasion for you to do anything in connection with the exe-

cution or completion of transactions which you have undertaken through your correspondents? A. None at all.

Q. With reference to participation in syndicates, to which you referred, did those participations include matters of stocks listed on the New York Stock Exchange? A. In a few cases they may have been listed.

Q. Did the participation have to do with the resale of the securities involved in the syndicate in this Commonwealth? A. It usually was a 194
further issue of some stock, either listed or unlisted, which was being syndicated in New York, and the New York syndicate allotted certain amounts to us to take or not, as we wanted.

Q. And you had the opportunity of reselling to customers in your usual line of business in Massachusetts? A. Yes.

Q. So that the purpose was your having participation for resale to customers here; is that right? A. To be merely distributors for the syndicate in New York.

Q. Mr. Whitney, are some stocks listed on the New York Stock Exchange also dealt in on the 195
Boston Stock Exchange? A. Yes.

Q. And that applies only to odd lots, does it not? A. Almost entirely odd lots.

Q. And is that approved of by the New York Stock Exchange? A. Yes, they know about it.

Q. That applies only to certain stocks that are few in number, does it not, Mr. Whitney? A. I do not know the exact number but not a great amount.

196 *Exhibit 6 of Return*

June 15, 1934, 2:30 P. M.

Q. Mr. Whitney, have you, since last Wednesday, gotten certain other figures with reference to the approximate business done, participations in syndicates, and commission rates from your records? A. Yes.

Q. How were you able to approximate the number of New York Stock Exchange shares which you handled on commission during 1929? A. These figures are all approximate. We took
197 the total number of shares of stocks executed on the New York Stock Exchange, New York Curb, and Boston Stock Exchange, averaged over 1927, 1928 and 1929. This total, in round figures, was 4,000,000 shares average for one year. We then calculated that three-quarters of the total shares were executed through our correspondents on the New York Stock Exchange. This would amount to 3,000,000 shares, bought and sold, for one year.

Q. Did you approximate any money value involved in all of these transactions, Mr. Whitney? A. I did.
198

Q. And what approximate money value did you fix, and how did you fix it? A. I took the total of 3,000,000 shares and assumed an average price of $50 per share over the three years.

Q. Is that a fair average from your knowledge of the business at that time, Mr. Whitney? A. That is merely a guess but probably perfectly fair.

Q. Then you multiplied that fifty dollar figure by the 3,000,000 shares, in order to approximate the total of the money value and arrived at $150,000,000? A. That is correct.

Q. As I understand it, most of the shares dealt in were purchased and sold on margin rather than outright purchase? A. Practically entirely.

Q. Have you checked up the number of syndicate underwriting participations which your firm had in 1929? A. Yes.

Q. And how many was that? A. This amounted to 88 different underwritings in which we participated.

Q. By that you mean 88 different securities? 200
A. Yes.

Q. At the time of these underwritings were any of these securities listed on the New York Stock Exchange? A. Probably none of them, although it is hard to determine.

Q. Were some of them listed on the Stock Exchange at or shortly after their underwriting? A. Very likely a few of them were listed after the syndicates were over.

Q. What was the schedule of commissions which were fixed by the New York Stock Exchange to be charged to non-members of the Exchange? A. The schedule is as follows: 201

For Securities Selling	Rate per Share
Under 50 cents	2 1/2 cents
At 50 cents and above, but under $1	3 "
At $1 and above, but under $10	7 1/2 "
N. Y. Curb—Selling at $1 to $5—5 cents	
At $10 and above, but under $25	12 1/2 "
At $25 and above, but under $50	15 "
At $50 and above, but under $75	17 1/2 "
At $75 and above, but under $100	20 "
At $100 and above, but under $200	25 "

202 *Exhibit 6 of Return*

Selling at $200 and above—5 cents per share will be added for each additional $50 or fraction thereof.

Q. The commissions, Mr. Whitney, which you have given in your previous answer are the ones which had to be charged by you to your customers, or by one of your New York correspondents to a person who did business directly in their office? A. Yes.

Q. And those are the commissions on which, 203 by arrangement between you and your correspondents, the correspondents charged you 40 per cent, and you collected the whole amount from your customer, keeping 60 per cent for yourself? A. That is correct.

C. HANDASYDE WHITNEY.

COMMONWEALTH OF MASSACHUSETTS.

Suffolk, ss:

Mr. C. Handasyde Whitney, having been duly sworn, stated before me that he had read the foregoing testimony, signed by him, and that 204 the same was true to the best of his knowledge and belief.

RICHARD J. MARTIN,
Notary Public within and for the
Commonwealth of Massachusetts.
My commission expires Feb. 12, 1939.

Exhibit 6 of Return Continued. 205

(Being Exhibit A Introduced at Hearing.)

CUSTOMER'S AGREEMENT

Harris, Upham & Co.
New York N. Y. Chicago Ill.

Dear Sirs:

In respect to all accounts which the Undersigned now has, or may hereafter have with you 206
or your successors (hereinafter referred to as you) for the purchase or sale of securities or commodities, or contracts for commodities or securities, including any account as guarantor, it is understood and agreed as follows:

Only actual purchases or sales are contemplated, and all orders shall be executed subject in all respects to the regulations and usages of the New York Stock Exchange or other exchange or market where executed; and you and your correspondents are hereby constituted agents of the Undersigned for the purpose of consummating all such transactions, and are 207
authorized to make such advances and expend such moneys as may be required in respect thereof;

All securities or commodities, or contracts for commodities or securities, now held or hereafter purchased by you for, or now or hereafter deposited with you by, the Undersigned, are to be held by you, as security for all liabilities of the Undersigned to you, however and whenever arising, and you are hereby authorized, without further notice to the Undersigned, and without regard to whether you have in your possession

208 *Exhibit 6 of Return*

or subject to your control at the time thereof other securities, commodities or contracts for commodities or securities of the same kind and amount, in the usual course of business to repledge, rehypothecate (either for the amount due you from the Undersigned, or for a greater sum) and loan the same from time to time separately or together with other securities either generally or to or for account of your other customers; and you shall not be required to
209 deliver to the Undersigned the same certificates or securities deposited or received but only certificates or securities of the same kind and amount;

You may from time to time demand additional security or that any account be immediately taken up and paid, and all amounts advanced and other balances due, with interest at the current rate, and all commissions fixed by the regulations and usages of the exchange or market where orders are executed shall be due and payable upon demand;

You may employ sub-brokers and shall be re-
210 sponsible only for reasonable care in their selection, and may settle contracts and controversies according to the regulations and customs of the exchange or market where orders are executed;

Upon failure of the Undersigned to comply with any of the provisions hereof, or whenever deemed necessary for your protection, you are hereby authorized and empowered to sell, assign and deliver all or any part of the securities, commodities or contracts for commodities or securities pledged hereunder upon any exchange or market or at any public or private sale, at your option, and/or to purchase to cover short sales and without demand for margin, and with-

 211

out advertisement or notice of purchase or sale, which are hereby expressly waived, and no specific demand or notice shall invalidate this waiver; and after deducting all costs and expenses of purchase or of sale and delivery, including commissions, transfer and stamp taxes, to apply the residue of the proceeds to the payment of the liabilities of the Undersigned to you, returning the surplus, if any, to the Undersigned; and upon any sale other than a private sale you may purchase the whole or any part 212
thereof free from any right of redemption; and the Undersigned shall remain liable for any deficiency;

All statements of account rendered the Undersigned from time to time shall be taken to be correct unless written notice to the contrary is given you within ten days after the receipt thereof;

All statements of account, notices or demands hereunder may be made by depositing the same in writing in the United States mails directed to the Undersigned at the address given below, or any other address of the Undersigned; 213

Notices and demands may, however, be given by you by any other means of communication;

Monthly debit-balances on accounts shall be charged in accordance with your usual custom with interest at a rate which shall include the average rate paid by you on your general loans during the month covered by such balances respectively, and any extra rates caused by market stringency, together with a charge to cover your credit service and facilities;

In all transactions wherein you act as the Undersigned's agent, the Undersigned agrees to wholly indemnify and save you free and

harmless from any loss, damage or liability arising out of such transaction howsoever same may occur and the Undersigned agrees promptly to pay on demand any loss or debit-balance arising in any account of the Undersigned;

Whenever you shall elect to give Undersigned notice of intention to liquidate his account giving time and place where sale is to occur, no oral agreement on the part of any of your agents agreeing to adjournment shall be binding; all such agreements must be in writ-
215 ing;

This agreement shall pertain to all accounts from time to time closed and then reopened and including accounts from time to time closed and then reopened and shall continue until revoked by the Undersigned in writing, such revocation to affect only transactions thereafter entered into between us.

* The Undersigned hereby represents that he is of full age and sound mind, that he is not connected as a clerk or employee with the New York Stock Exchange or any other exchange,
216 nor with a member of that Exchange or any other exchange engaged in the business of dealing in securities or commodities, nor is he connected as a clerk or employee with any bank, trust company, banker or insurance company, nor with any broker, firm or corporation engaged in the business of dealing in securities or commodities.

Dated Dec. 4, 1929.

Yours truly,

WHITNEY & ELWELL,
Address Boston

In the presence of

* This clause is part of the agreement only in the case of individual customers.

Exhibit 6 of Return, cont'd.
Being Exhibit B. introduced at hearing.

Exhibit B
RJM

WHITNEY & ELWELL
30 STATE STREET
BOSTON

MEMBERS
NEW YORK STOCK EXCHANGE
BOSTON STOCK EXCHANGE

TEL. HUBBARD 7300

Upon your order we have this day BOUGHT for your account: BOSTON,

QUANTITY	DESCRIPTION	PRICE	AMOUNT	COMMISSION	ODD LOT FEE	NET AMOUNT	BROKER

IN ACCEPTING THIS CONFIRMATION THE CUSTOMER AGREES WITH WHITNEY & ELWELL:

(a) That he intends on all orders or contracts for the purchase or sale of securities that we, either personally or by agent, shall make actual purchases and sales or valid contracts therefor.
(b) That all transactions wherever executed be subject to and governed by the rules and custom of the market, exchange or board where executed and of its clearing house, if any, and members.
(c) That any and all securities held by us on the account of the customer, either alone or with other securities and up to and for more than the amount for which said securities are held by us may be pledged, repledged or loaned, with unlimited power to repledge, to other customers of ours or their agents or to other brokers, and that securities so pledged, repledged or loaned are considered within our control.
(d) That if securities which are not on deposit in the customer's account are ordered sold for his account we are authorized and requested to complete said sales and to borrow the securities for delivery on the account of the customer.
(e) That without call or notice to the customer we may close out the whole or any part of the customer's open account at public or private sale by buying or selling from or to ourselves or others.

E. & O. E.

WHITNEY & ELWELL

IF NOT CORRECT PLEASE NOTIFY US IMMEDIATELY.

PER _____

Exhibit 6 of Return, cont'd.
Being Exhibit C. introduced at hearing.

Exhibit C
RJM

WHITNEY & ELWELL
30 STATE STREET
BOSTON

MEMBERS
NEW YORK STOCK EXCHANGE
BOSTON STOCK EXCHANGE

TEL. HUBBARD 7300

Upon your order we have this day SOLD for your account: BOSTON,

QUANTITY	DESCRIPTION	PRICE	AMOUNT	COMMISSION	TAX	NET AMOUNT	BROKER

IN ACCEPTING THIS CONFIRMATION THE CUSTOMER AGREES WITH WHITNEY &

(a) That he intends on all orders or contracts for the purchase or sale of securities that we, either personally or by agent, shall make actual purchases and sales or valid contracts therefor.
(b) That all transactions wherever executed be subject to and governed by the rules and custom of the market, exchange or board where executed and of its clearing house, if any, and members.
(c) That without call or notice to the customer we may close out the whole or any part of the customer's open account at public or private sale by buying or selling from or to ourselves or others.

E. & O. E.

IF NOT CORRECT PLEASE NOTIFY US IMMEDIATELY.

PER _____

220 **Exhibit 7 of Return.**

STATE OF NEW YORK

STATE TAX COMMISSIONER—INCOME TAX BUREAU.

IN THE MATTER

of

Application of C. HANDASYDE WHITNEY for revision and readjustment of personal income taxes assessed for the year 1929.

221

Affidavit of C. Handasyde Whitney with reference to the disposal of his right attaching to the New York Stock Exchange membership standing in his name.

Mr. C. Handasyde Whitney, being sworn, deposes and says:

1. On or about February 9, 1929, I was informed by the Secretary's office of the New
222 York Stock Exchange that I was entitled to one-quarter of a new membership in the New York Stock Exchange on account of any ownership of one such membership.

2. Shortly thereafter I informed the Secretary of the Exchange that my so-called right to a new one-quarter interest was for sale at a limit of $120,000.00. I authorized the Secretary to contract for the sale of such right.

3. On or about March 8, 1929, I reduced the limit at which the right was for sale to $105,000.00.

Exhibit 7 of Return

4. On March 12, 1929, I was informed by the Secretary of the New York Stock Exchange that he had contracted to sell the right attaching to the seat standing in my name for $108,000.00.

5. On March 9, 1929, I received a power of attorney from the Secretary of the New York Stock Exchange which I executed and by which I appointed our New York correspondents at that time Messrs. F. B. Keach & Company to act as my attorney for me in connection with the final disposition of my said right.

6. The sale of my said right was completed through Mr. West of the firm of F. B. Keach & Company and the money therefor was paid to my firm through Messrs. F. B. Keach & Company.

s. C. HANDASYDE WHITNEY.

Commonwealth of Massachusetts,
Suffolk, ss:

Personally appeared before me C. Handasyde Whitney and made oath that the foregoing affidavit my him described was true.

s. MARCIEN JENCKES,
Notary Public.

226 **Exhibit 8 of Return.**

Determination of State Tax Commission, Dated December 10, 1934.

STATE OF NEW YORK

THE STATE TAX COMMISSION

IN THE MATTER

of

227 The Application for Revision of Income Taxes Assessed against C. HANDASYDE WHITNEY for the Year 1929.

No return of personal income having been filed by the taxpayer for the taxable year 1929, on March 8th, 1933, assessment of tax in the amount of $2,115.00, our No. 562190, was duly stated and notice thereof mailed to the taxpayer; and thereafter on March 22nd, 1933, a return having been filed by the taxpayer under protest upon which the tax was computed by the taxpayer at $283.00 only; and said return having been duly audited and the amount of tax due under assessment No. 562190 having been adjusted at $181.82 and the balance thereof cancelled; and on May 5th, 1933, an additional tax having been found due of $98.18 upon the audit of said return and due notice thereof having been given to the taxpayer under additional assessment No. 567511 on said date, a total of additional taxes for the year of $280.00; and the taxpayer having duly made application under Section 374 of the Tax Law for a recomputation and revision of

228

such assessments; and the taxpayer having waived the formal hearing provided under Section 374 of the New York State Tax Law and the matter having come on for hearing by stipulation before Roy H. Palmer, Esq., First Assistant Director of the State Income Tax Bureau, on June 13th, 1934, the taxpayer having been represented by Marcien Jenckes, Attorney, 30 State Street, Boston, Massachusetts; and testimony having been taken and it having been stipulated that the record thereof should be of the same force and effect as though taken in a formal hearing before the State Tax Commission; and such record having come before the Commission for review, and it appearing that no questions of fact are involved but only questions of law, and such questions of law having been duly considered by the Commission, it is

DETERMINED: That the computation of the additional taxes against the said taxpayer for the year 1929 in accordance with the audit of said return was correct, and that the additional taxes so stated were properly assessed and due, and do not include any taxes or other charges which should not have been lawfully demanded, and that no payment has been illegally made or exacted thereupon; and that the taxpayer is not entitled to any further resettlement of the taxes so assessed.

Dated, Albany, N. Y., December 10, 1934.

THE STATE TAX COMMISSION

(Signed) MARK GRAVES
Commissioner.

(Signed) JOHN P. HENNESSEY,
Commissioner.

232 **Stipulation Waiving Certification in Appellate Division.**

Pursuant to the Civil Practice Act it is hereby stipulated and agreed that the foregoing printed papers are true copies of the original notice of application for writ of certiorari, petition, undertaking, order for writ, writ of certiorari, admissions of service, return to the writ by the State Tax Commission and its determination and of all the papers upon which the New York State Tax Commission acted in
233 making the determination herein sought to be reviewed, the whole constituting the complete record now on file with the Clerk of Albany County.

Certification of the foregoing papers is hereby waived.

Dated, New York, 1935.

CLARK, CARR & ELLIS,
Attorneys for Relator.

JOHN J. BENNETT, Jr.,
Attorney-General,
Attorney for Defendants.

234

Order of Appellate Division Confirming Determination. 235

At a Term of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, held at the County Court House in the City of Albany, New York, commencing on the 17th day of September, 1935.

Present: Hon. James P. Hill,
Presiding Justice. 236
Hon. Leon C. Rhodes,
Hon. Daniel V. McNamee,
Hon. John C. Crapser,
Hon. F. Walter Bliss,
Associate Justices.

PEOPLE OF THE STATE OF NEW YORK, *ex rel.* C. Handasyde Whitney,
Relator,
against
MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Tax Commissioners of the State of New York, 237
Defendants.

The relator, C. Handasyde Whitney, in the above entitled proceeding having heretofore and on the 8th day of March, 1935, obtained an order and writ of certiorari to review a final determination of the State Tax Commission, made on or about the 10th day of December, 1934, as-

238 *Order of Appellate Division Confirming Determination*

sessing an additional income tax against the relator for the calendar year 1929; and a return to said order and writ of certiorari having been duly made, and the issues raised having come on for hearing before this Court, at the above named term thereof; and the cause having been argued and the relator having appeared by Clark, Carr & Ellis, Esquires, and Marcien Jenckes, Esq., his attorneys, and the defendants
239 having appeared by Hon. John J. Bennett, Jr., Attorney-General of the State of New York, Joseph M. Mesnig, Assistant Attorney-General, of Counsel, their attorneys; and due deliberation having been had thereon,

Now, on motion of John J. Bennett, Jr., Attorney-General of the State of New York, attorney for the defendants, it is

Ordered, That the said determination of the State Tax Commission, made on or about the 10th day of December, 1934, be, and the same hereby is, unanimously confirmed, with fifty dollars costs.

240 JOHN S. HERRICK,
Clerk.

Decision of Appellate Division Confirming Determination.

SUPREME COURT,

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT.

Nov. 13, 1935.

PEOPLE OF THE STATE OF NEW YORK, *ex rel.* C. HANDASYDE WHITNEY,
Relator,
v.
MARK GRAVES and Others, as Tax Commissioners of the State of New York,
Defendants.

Certiorari to review a final determination of the State Tax Commission assessing additional income tax against relator for the calendar year 1929.

The question presented is whether the State of New York has jurisdiction to tax as income profits derived by a non-resident from the sale of an interest in a membership on the New York Stock Exchange.

Relator, a resident of Massachusetts, acquired an undivided share or interest in a New York State Stock Exchange membership, which interest he sold at a profit, and the State Tax Commission has imposed a tax upon such profit, as income upon property within the State of

244 *Decision of Appellate Division Confirming Determination*

New York, pursuant to the provisions of Section 351 of the Tax Law.

Relator and his firm were the owners of a membership on the Stock Exchange in addition to their interest or share in the membership here involved. He and his said firm did not use their membership rights for the purpose of trading upon the floor of the Exchange. Orders of the firm were placed and executed through an-
245 other New York brokerage firm, in the same way as any customer would have placed such an order with the New York firm, the only advantage accruing to the relator and his firm being that by virtue of their being members of the New York Stock Exchange, their orders placed with other brokers for execution, were carried out for a smaller commission charge than the charge to customers not members of the Exchange.

Determination unanimously confirmed with fifty dollars costs and disbursements.

Present—Hill, P. J., Rhodes, McNamee, Crap-
246 ser and Bliss, JJ.

Order of Court of Appeals Granting Permission to Appeal.

STATE OF NEW YORK,

IN COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the tenth day of March, A. D. 1936.

Present: Hon. Frederick E. Crane,
Chief Judge, presiding.

THE PEOPLE, &c., on relation of C. HANDASYDE WHITNEY,
Relator,

vs.

MARK GRAVES, JOHN P. HENNESSEY and JOHN J. MERRILL, as Tax Commissioners of the State of New York,
Defendants.

A Motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the relator herein, and papers having been duly submitted thereon, and due deliberation thereupon had:

Ordered, that the said motion be and the same hereby is granted.

A copy.

JOHN LUDDEN,
Deputy Clerk.

(Seal of the Court of Appeals)

250 **Notice of Appeal to Court of Appeals.**

SUPREME COURT,

APPELLATE DIVISION—THIRD DEPARTMENT.

PEOPLE OF THE STATE OF NEW YORK, *ex rel.* C. HANDASYDE WHITNEY,

Relator,

against

251 MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Tax Commissioners of the State of New York,

Defendants.

Sir:

Please Take Notice that pursuant to permission granted by the Court of Appeals, the above named Relator hereby appeals to the Court of Appeals from the order of the Appellate Division of the Supreme Court, Third Judicial De-
252 partment, entered herein in the Office of the Clerk of the County of Albany, on or about the 19th day of November, 1935, confirming on certiorari a determination of the State Tax Commission assessing a tax under Section 375 of Article 16 of the Tax Law, and denying application of the Relator, pursuant to Section 374 of the Tax Law, for revision and refund of the tax assessed against him for the tax year 1929,

and Relator appeals from each and every part of said order and the whole thereof.

Dated, March 11, 1936.

CLARK, CARR & ELLIS,
Attys. for Relator-Appellant,
120 Broadway,
New York City.

To:

John J. Bennett, Jr., Esq.,
Attorney-General,
Attorney for Defendants-Respondent,
John A. Knox,
Clerk of Albany County.

Stipulation Waiving Certification.

[Same Title.]

It Is Stipulated that the foregoing are true and correct copies of the decision and order of the Appellate Division of the Supreme Court, Third Judicial Department confirming the determination of the defendants, the order of the Court of Appeals granting permission to relator to appeal to the Court of Appeals herein, and the notice of appeal by the relator-appellant to the Court of Appeals, now on file in the Office of the Clerk of Albany County. Certification thereof is hereby waived, and it is stipulated that the within case is hereby adopted as the case on appeal to the Court of Appeals.

Dated, March , 1936.

CLARK, CARR & ELLIS,
Attorneys for Relator-Appellant.
JOHN J. BENNETT, Jr.,
Attorney for Defendants-Respondents.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 86] IN COURT OF APPEALS OF NEW YORK

STATE OF NEW YORK, SS:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 19th day of May in the year of our Lord one thousand nine hundred and thirty-six, before the Judges of said Court.

Witness the Hon. Frederick E. Crane, Chief Judge, Presiding. John Ludden, Clerk.

REMITTITUR—May 20, 1936

[fol. 87] THE PEOPLE, ETC., ex Rel. C. HANDASYDE WHITNEY, Appellant,

ag'st

MARK GRAVES & ors., as Tax Commissioners of the State of New York, Respondents

Be it Remembered, That on the 24th day of March, in the year of our Lord one thousand nine hundred and thirty-six, C. Handasyde Whitney, the appellant in this cause, came here into the Court of Appeals, by Clark, Carr & Ellis, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Mark Graves and others, as tax commissioners, etc., the respondents in said cause, afterwards appeared in said Court of Appeals by John J. Bennett, Jr., Attorney General.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Paul A. Crouch, of counsel for the appellant; and by Mr. Joseph M. Mesnig, of counsel for the respondents; and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be, and the same hereby is affirmed with costs.

[fol. 88] And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court there to be proceeded upon according to law.

And afterwards, to wit, on the 26th day of May, 1936, an order was duly made amending the remittitur herein, a certified copy of which order is hereto attached and made a part hereof.

Therefore, It is considered that the said order be affirmed with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS

Clerk's Office

Albany, May 20, 1936.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 89] IN COURT OF APPEALS OF NEW YORK

Present: Hon. Frederick E. Crane, Chief Judge, Presiding.

THE PEOPLE OF THE STATE OF NEW YORK on Relation of C. HANDASYDE WHITNEY, Appellant,

vs.

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Tax Commissioners of the State of New York, Respondents

ORDER AMENDING REMITTITUR—May 26, 1936

A motion to amend the remittitur in the above cause having been heretofore made herein upon the part of the appellant, papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is granted and remittitur amended by adding thereto the following:

"Upon the appeal herein the relator contended that the assessment of a tax against relator under Sections 351 and 351-a of the Tax Law of the State of New York contravenes the Fourteenth Amendment of the Federal Constitution as an extraterritorial tax, and such question was presented and necessarily passed upon but not sustained by the court."

A Copy.

Rufus Kimball, Deputy Clerk. (Seal.)

[fol. 89½] Clerk's certificate to foregoing papers, omitted in printing.

SIR:

Take notice that the within is a copy of Remittitur and Order amending Remittitur, duly filed and entered in the office of the Clerk of Albany County, on the 1st day of June, 1936.

Yours, etc., John J. Bennett, Jr., Attorney-General, Attorney for Respondents, Office and Post Office Address: Capitol, Albany, N. Y.

To Clark, Carr & Ellis, Esqs., Attorney for Appellant, 120 Broadway, New York, N. Y.

[fol. 90] In Supreme Court of New York, Albany County

The People of the State of New York on Relation of C. Handasyde Whitney, Relator,

against

Mark Graves, John J. Merrill and John P. Hennessey, as Tax Commissioners of the State of New York, Respondents

Order on Remittitur—June 1, 1936

The relator above named having appealed to the Court of Appeals from a final order of the Appellate Division of the Supreme Court, Third Judicial Department, in the above entitled proceeding, and which order unanimously confirmed a final determination of the respondents as Commissioners constituting the State Tax Commission of the State of New York, made on or about the tenth day of December, 1934, affirming an assessment of additional income taxes against the relator for the calendar year 1929, and which said final order was duly entered in the office of the Clerk of the Appellate Division, Third Department; and the appeal having been duly argued at the Court of Appeals, and after due deliberation had thereon, the Court of [fol. 91] Appeals having made its decision and having ordered and adjudged that the order of the Appellate Division of the Supreme Court so appealed from be affirmed, with costs, and having further ordered that the proceedings and record herein be remitted to the Supreme Court, there to be proceeded upon according to law.

Now, on reading the remittitur from the Court of Appeals herein, and the order of the Court of Appeals made on the 26th day of May, 1936, granting relator-appellant's motion to amend said remittitur, and upon motion of John J. Bennett, Jr., Attorney-General of the State of New York, Attorney for the above named respondents, it is

Ordered, that the said order and judgment of the Court of Appeals be, and the same hereby are, made the order and judgment of this Court, and it is further

Ordered, that the respondents have judgment against C. Handasyde Whitney, the relator herein, for their costs and disbursements in the Court of Appeals, to be taxed.

Gilbert Schenck, Justice of the Supreme Court.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 91½] SIR:

Take notice that the within is a copy of Order, duly filed and entered in the office of the Clerk of Albany County, on the 1st day of June, 1936.

Yours, etc., John J. Bennett, Jr., Attorney-General, Attorney for Respondents, Office and Post Office Address: Capitol, Albany, N. Y.

To Clark, Carr & Ellis, Esqs., Attorney for Relator, 120 Broadway, New York, N. Y.

[fols. 92 & 93] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

Petition of the Relator for Appeal, Assignment of Errors and Prayer for Reversal

[fol. 94] ASSIGNMENT OF ERRORS

8. The appellant, C. Handasyde Whitney assigns the following errors in the record and proceedings had in this case:

The Court of Appeals erred:

1. In holding that the Petitioner, a resident of Massachusetts who never had an office or place of business in New York was subject to income taxation under sections 351 and 351A of the New York Tax Law on profit resulting from the sale of a fraction of a New York Stock Exchange membership.

2. In holding that the Petitioner's fractional Exchange membership which he sold in 1929 was "property owned" in New York.

3. In holding that the Petitioner's Exchange membership had acquired a "business sifus" in New York sufficient to permit profit from the sale of a fraction thereof to be taxable as income from "property owned in New York."

4. In failing to reverse the order of the Supreme Court Appellate Division Third Judicial Department and the determination of the Appellees on the ground that the tax levied against the appellant was unconstitutional and void as beyond the jurisdiction of New York.

PRAYER FOR REVERSAL

Wherefore, on account of the foregoing errors, the appellant prays that the said order and judgment of the Supreme Court of the State of New York and that the said decision of the Court of Appeals of the State of New York, upon which said order and judgment were entered, in the above entitled cause, be reviewed by the Supreme Court of the United States and reversed and judgment rendered in favor of the appellant with costs in all courts; that a [fol. 95] transcript of the records duly authenticated be sent to Washington as provided by law and that an order be made fixing the security to be provided by the appellant, and that the bond tendered by him be approved.

C. Handasyde Whitney, by Clark, Carr, & Ellis, Attorneys.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 96] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL

The appellant in the above entitled case, having prayed for the allowance of an appeal in this case to the Supreme Court of the United States from the order and judgment of the Supreme Court of the State of New York entered in the office of the Clerk of Albany County on June 1, 1936, upon the remittitur handed down by the Court of Appeals on May 20, 1936, as amended by order of said Court of Appeals on May 26, 1936, and having presented and filed its petition for appeal, assignments of error, prayer for reversal and statement as to jurisdiction on appeal pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided;

It Is Now Ordered that an appeal be and the same is hereby allowed to the Supreme Court of the United States as provided by law, and

It Is Further Ordered that the Clerk of the Supreme Court of the State of New York for Albany County, to which court the record herein has been remitted, shall pre-
[fols. 97-102] pare and certify a transcript of the record, proceedings, order and judgment in this cause and transmit the same to the Supreme Court of the United States so that the transcript shall reach said court within forty days of this date.

And it is Further Ordered that the security for costs on appeal be fixed in the sum of Five Hundred Dollars ($500).

Frederick E. Crane, Chief Judge of the Court of Appeals of the State of New York.

Dated June 16th, 1936.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 103] In Supreme Court of the United States

Statement of the Appellant Under Rule 13 Paragraph 9—Filed August 3, 1936

Now comes the appellant in the above entitled case and in compliance with Rule 13 Paragraph 9 of the Rules of the Supreme Court of the United States makes this statement of the points on which he intends to rely and of the parts of the record which he thinks necessary for the consideration thereof.

Points on Which the Appellant Intends to Rely

1. The appellant is a resident of Massachusetts and neither he nor any of his partners ever had a domicile in or carried on business in New York.

2. The situs of the appellant's membership in the New York Stock Exchange, an unincorporated association organized in 1799 holding the beneficial ownership of the stock of the corporation owning the land and building in New York City where the exchange is located, is, for the purposes of the income taxation of profit resulting from a

sale of a fraction of that membership, at the appellant's domicile in Massachusetts unless the membership has acquired a "business situs" in New York.

[fol. 104] 3. The appellant's membership in the New York Stock Exchange had not acquired a "business situs" in New York sufficient to permit the State of New York to tax as income from "property owned in New York" the profit resulting to the petitioner from the sale of a fraction of that membership.

4. Profit resulting to the appellant from the sale of a fraction of a membership in the New York Stock Exchange is not subject to income taxation by the State of New York under Sections 351 and 351A of the New York Tax Law.

Parts of the Record Necessary for the Consideration of the Appellant's Points

1. The following portions of the printed record on appeal in the Court of Appeals for the State of New York constituting parts of the papers in the case noted hereunder at the following pages and folios:

Caption of paper	Pages	Folios
Petition for Order and Writ of Certiorari served Feb. 27, 1935, filed March 8, 1935	4–12	12–35
Return to writ of certiorari and exhibits as follows:	30–31	88–93
Exh. 1	32–35	
Exh. 3	37–38	109–114
Exh. 5	41–43	121–128
Exh. 6	44–73	130–216 and exhibits B & C attached between pages 72 & 73
Exh. 7	74, 75	220–224
Exh. 8	76, 77	226–231
Order of Appellate Division confirming determination	79, 80	235–240
Decision of Appellate Division confirming determination	81–82	241–246

2. The following papers certified in typewritten form to the United States Supreme Court by the clerk for Albany County:

Remittitur of the Court of Appeals dated May 20, 1936 and order amending remittitur dated May 26, 1936.

[fol. 105] Final order and judgment on Remittitur entered in the Supreme Court of New York for Albany County June 1, 1936.

Assignment of Errors.

Prayer for Reversal.

Order allowing appeal.

John L. Hall, Marcien Jenckes, Counsel for Appellant.

Service acknowledged this 31st day of July, 1936.

John J. Bennett, Jr., Counsel for Appellee, Address: Attorney General's Dept., Albany, N. Y.

[fol. 106] [File endorsement omitted.]

Endorsed on cover: Enter Claude R. Branch. File No. 40,758. New York Supreme Court. Term No. 218. The People of the State of New York, ex rel. C. Handasyde Whitney, Appellant, vs. Mark Graves, John P. Hennessey and John J. Merrill, Tax Commissioners of the State of New York. Filed July 22, 1936. Term No. 218, O. T., 1936.